Nos. 66 and 67.

Brief of Mynderse for Canton Ins. Co.

Filed Oct. 25, 1897.

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JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES.

Nos. 66 and 67.

PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED,
Petitioner,

against

THE CANTON INSURANCE COMPANY, LIMITED, AND OTHERS; JOHN McINTYRE, JR., AND OTHERS,
Petitioners,

against

THE CANTON INSURANCE COMPANY, LIMITED, AND OTHERS.

Brief for Canton Insurance Co. (Lim.)

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Appellant.

WILHELMUS MYNDERSE,
Advocate.

Supreme Court of the United States.

PORT OF PLYMOUTH STEAMSHIP COMPANY LIMITED,
Appellant,

vs

THE CANTON INSURANCE COMPANY LIMITED, AND OTHERS,
Respondents.

No. 66.

JOHN MACINTYRE JR., AND OTHERS,
Appellants,

vs

THE CANTON INSURANCE COMPANY LIMITED, AND OTHERS,
Respondents.

No. 67.

Brief for the Canton Insurance Company, Limited and others, owners of the cargo of the steamer Plymothian.

On the 12th day of November 1891 the steamers *Victory* and *Plymothian* came into collision in the Elizabeth River between Lambert's Point and Craney Island Light.

At the time of the collision the *Victory* was bound in ballast from Hampton Roads to Norfolk. The *Plymothian* was bound to sea. She had left Galveston November 1st, with a

cargo of 3682 bales of cotton, bound to Liverpool, and had in the prosecution of that voyage come in through Hampton Roads and taken coals at Lambert's Point.

By the collision the port side of the *Plymothian* was cut below the water's edge near amidships, and to save her from sinking she was run ashore. Some of her compartments filled with water and her cargo was much damaged.

Several suits were brought by persons sustaining damage, and thereupon the owners of each steamer instituted proceedings for limitation of liability.

The value of the *Victory* was appraised at $67,500, and her owners gave stipulation for that amount.

The value of the *Plymothian* was appraised at $33,350, and the value of her freight at $11,871, making a total of $45,221, which must be reduced, however, by the steamer's proportion of the expenses incurred for salvage services to her and her cargo. This has been fixed by consent at $5,000, leaving the limit of her owner's liability, therefore, $40,221.

In response to citations issuing in these proceedings, the damages arising out of the collision were presented and assessed. The damages sustained by the owners of the *Victory* were put forward in the proceedings instituted by the owners of the *Plymothian* and were assessed at £2,951.12s. 4d., or about $14,500. The damages sustained by the owners of the *Plymothian* were put forward in the proceedings instituted by the owners of the *Victory* and were assessed at £8,565.10s. 6d., or about $42,000; and the damages sustained by the owners of the *Plymothian's* cargo were put forward in both proceedings and were assessed at £14,566, or about $72,000.

The *Victory* alleged that she was bound up the eastern side of the channel under reduced speed, with her master and a local pilot on the bridge; that she saw the *Plymothian* come out of Lambert's Point, cross to the western side of the channel and steady down the western side; that thereafter the *Plymothian* crossed to the eastern side of the channel, although the *Victory* gave signals that she was intending to hold the eastern side of the channel herself; that the *Victory* stopped and reversed her engines, but that nevertheless the collision occurred. She charged, also, that the *Plymothian's* whistle was defective.

The *Plymothian* alleged that when she came out from Lambert's Point she rounded into the channel as close as possible

to the eastern edge; that, after steadying down the eastern side of the channel, she saw the *Victory* coming up about mid-channel; that she signaled the *Victory* to pass port to port, but that the *Victory* starboarded and ran over to the eastern edge of the channel; that thereupon the *Plymothian* stopped and reversed her engines, but could not avoid collision. The master was on her bridge with a local pilot.

The collision occurred at Buoy No. 7, a buoy marking the eastern edge of eighteen-foot water.

The steamers came together at less than a right angle, there being about sixty to seventy degrees between the port side of the *Victory* and the starboard side of the *Plymothian*.

The District Court held that the collision was due solely to the fault of those navigating the *Victory;* but that it occurred without any fault or privity on the part of the owners of the *Victory (Opinion, pp. 447–458).* A final decree was accordingly entered October 30, 1894, by which it was decreed that the owners of the *Victory* should have the benefit of limitation of liability provided by the statutes of the United States, and that the amount of her appraised value, after deducting therefrom costs of $1,138.48 incident to establishing the right to limitation, be paid ratably to the owners of the *Plymothian* and to the owners of the *Plymothian's* cargo, in proportion to the amount of their adjudicated claims *(Decree, pp. 463, 464),* and that the owners of the *Plymothian* recover against the owners of the *Victory* and the owners of the cargo of the *Plymothian* their costs, aggregating $1,681.80 *(Decree, p. 465.)*

Appeal was taken from this decree by the owners of the *Victory (Record, pp. 477, 478).*

The owners of the cargo of the *Plymothian* likewise appealed from the decree, in so far as it held that the navigators of the *Plymothian* were free from fault contributing to the collision; and in so far as it held that the owners of the *Plymothian* should participate in the fund arising from the appraised value of the *Victory* upon equal footing with the cargo instead of subordinating their claim to the claims of the cargo *(Record, pp. 466-477).*

Upon the hearing of the appeals the United States Circuit Court of Appeals reversed the decree of the District Court

and held that the collision was due not only to the fault of those in charge of and navigating the *Victory*, but likewise to fault of those in charge of and navigating the *Plymothian*.

The court held that the owners of the steamers were entitled to limitation of their liability. They further held that as between the two steamers, the fault of the *Victory* was the more pronounced, and that her owners should therefore pay the cargo claims as far as the *Victory's* stipulated value would suffice, and that any amount remaining unsatisfied on account of the cargo claims should be paid by the owners of the *Plymothian*. A decree was entered accordingly (*Record, pp. 513–515*).

Under such decree the *Victory* bears about four sevenths of the total loss arising from the collision, and the *Plymothian* about three sevenths.

Upon petitions filed by the owners of the two steamers this court has issued writs of *certiorari*, under which the causes now come on for hearing.

The owners of cargo charge as faults against the *Victory*:

1st. That though meeting the *Plymothian* head to head, or nearly so, she did not port, but starboarded.

2nd. That she proceeded up the narrow channel of the Elizabeth River on the port or eastern side of the channel instead of upon the starboard or western side.

3rd. That she did not maintain a good lookout.

4th. That she did not sooner stop and reverse.

They charge as faults against the *Plymothian*:

1st. That she did not maintain a good lookout.

2nd. That she did not sooner blow an alarm signal and stop and reverse her engines.

3rd. That she persisted in porting.

They submit that there was no error in the rulings of the court in declining to give to the *Plymothian* the benefit of the British law in construing her bills of lading, and that there was no error in the method of apportioning of damages.

POINTS.

First.

THE VICTORY, BY HER FAULTS, CAUSED OR CONTRIBUTED TO THE COLLISION.

A. The *Victory* should have ported on seeing the *Plymothian*, instead of which she starboarded.

The channel of the Elizabeth River between Craney Island Light and Lambert's Point ranges for vessels of the class of the *Plymothian* and *Victory* from 300 to 400 yards in width *(Chart)*.

The *Victory* and *Plymothian* sighted each other when the *Plymothian* was at Lambert's Point, and when the *Victory* was at or below Craney Island Light, a distance of more than a mile.

The vessels were practically end on, or head and head, and each was under the duty of porting, so that they would pass each to the port side of the other.

The District Court held that the navigation of the *Victory* violated the provision of the International Regulations adopted by Congress in 1885.

The Circuit Court of Appeals, while holding to the opinion that the International Rules of 1885 were applicable and that the *Victory* was in fault for their violation, held that the navigation of the *Victory* was as well in violation of the provisions of Section 4233 of the Revised Statutes, and likewise of the customs regulating the navigation of the Elizabeth River.

Under a recent decision of this court all doubt is removed as to the rules governing the waters where the collision occurred.

The Delaware, 161 U. S. 459.

This decision relieves the *Victory* from the specific provision of Article 21 of the Act of March 3, 1885:

"ARTICLE 21. In narrow channels every steamship shall, "when it is safe and practicable, keep to that side of the fair-"way or mid-channel which lies on the starboard side of such "ship."

But she is left subject to the provisions of Section 4233 of the United States Revised Statutes as supplemented by the Pilot Rules of the Supervising Inspectors, and subject also to the special customs observed in the navigation of the Elizabeth River.

The pilot of the *Victory* locates his own vessel, when near Craney Island Light, at mid-channel *(Nelson, p. 336)*, and locates the *Plymothian*, when first seen, in mid-channel *(Nelson, pp. 331, 342)*.

"Q. You saw her go over from Lambert's Point pier?
"A. Yes, sir; and straightened down the middle of the channel" *(Nelson, p. 331)*.

* * * * * * *

"Q. You noticed when she came out and got about mid-channel she hung in mid-channel some time, and then she went to the eastern side?
"A. Yes, sir.
"Q. You don't desire to correct that in any way?
"A. No, sir.
"Q. And as for the period she was hanging in mid-channel it may have been a minute or two?
"A. Going down, sir.
"Q. Hanging down the mid-channel?
"A. Yes, sir.
"Q. And that was about one or two minutes?
"A. Yes, sir; I suppose so" *(Nelson, p. 342)*.

If both vessels were in mid-channel, one bound up and the other bound down, they were meeting end on, or head and head; and this position was not legally disturbed even if, in holding the mid-channel, one or the other was required by the conformation of the channel to turn from time to time a little to port or a little to starboard.

This position of the vessels being recognized by the pilot of the *Victory*, the man who was charged with the responsibility for her navigation, there is little need of referring to other witnesses in corroboration.

That the *Victory* was in mid-channel, however, is testified to by witnesses presented by each steamer *(Etheridge, p. 354; Henley, p. 366; Channel, p. 429; Harvey, p. 433; Mardon, p. 443)*.

That the *Plymothian* was in mid-channel is testified to by two of the *Victory's* principal witnesses *(Martin, p. 321; Nelson, pp. 331, 342)*.

The greater number of the *Victory's* witnesses place the *Plymothian* to the western side of mid-channel, while the *Plymothian*, by her witnesses, claims to have been on the eastern side of mid-channel. The average of the witnesses puts her in mid-channel, just where Nelson, the *Victory's* pilot, claims that he saw her *(Nelson, pp.* 331, 342*)*

Both vessels being in mid-channel, one bound up and the other bound down, each, whether under the statute or under the Pilot Rules, should have ported.

Instead of porting, the *Victory* starboarded *(Candlish, p.* 38; *Gilbert, p.* 65; *Elcoate, p.* 138*)*.

B. The *Victory* should have held the western side of mid-channel in coming up the river, instead of which she crossed to the eastern side.

(**a**) The Statute provides:

"RULE EIGHTEEN. If two vessels under steam are meeting "end on or nearly end on, so as to involve risk of collision, the "helms of both should be put to port, so that each may pass "on the port side of the other."

U. S. Revised Statutes, § 4233.

Both vessels being in mid-channel, one bound up channel and the other bound down, they were meeting end on, or nearly end on.

It matters not whether at the moment of sighting each other each bore a little on the bow of the other or not. By reason of the swing which the *Plymothian* was making, and by reason of irregularities in the course of the channel, such a bearing of one over the bow of the other might occur and still the vessels be, in a legal sense, end on or nearly end on. They were on courses one bound up channel and one down channel which, both being in mid-channel, would necessarily bring them within the operation of Rule 18.

(**b**) The Pilot Rules of the Supervising Inspectors supplement the Statute and remove any doubt that might arise from a too literal construction of Rule 18.

The material rules are as follows:

"RULE I. When steamers are approaching each other 'head "and head' or nearly so, it shall be the duty of each steamer "to pass to the right or port side of the other; and the pilot

" of either steamer may be first in determining to pursue this " course, and thereupon shall give as a signal of his intention " one short and distinct blast of his steam whistle, which the " pilot of the other steamer shall answer promptly by a similar " blast of his steam whistle, and thereupon such steamers shall " pass to the right, or port side, of each other. But if the " course of such steamers is so far on the starboard of each " other as not to be considered by pilots as meeting 'head and " head', or nearly so, the pilot so first deciding shall imme- " diately give two short and distinct blasts of his steam whistle, " which the pilot of the other steamer shall answer promptly " by two similar blasts of his steam whistle, and they shall " pass on the left, or on the starboard side of each other." *(Record, p. 344).*

" RULE II. When steamers are approaching each other in " an oblique direction (as shown in diagram of the 4th situa- " tion) they shall pass to the right of each other as if meeting " 'head and head' or nearly so, and the signals by whistles " shall be given and answered promptly as in that case speci- " fied." *(Record, p. 431).*

Now whether the *Plymothian* and *Victory* were exactly head and head or not, it is apparent that they were nearly head and head inasmuch as the one was bound up and the other was bound down a narrow channel. It must be admitted, at least, that they were approaching each other in "an oblique direction"; and, whatever their exact bearings, it is certain that under Rule II of the Pilot Rules each vessel was bound to port her helm, and pass to the right of the other. This Rule imposed upon the *Victory* exactly the same duties that rested upon her under Rule 18 of Section 4233 of the Revised Statutes, and as are suggested by Article 21 of the International Rules of 1885. By porting her helm to pass to the right she would have gone up on the starboard or western side of the channel, just where the International Rules indicate that a vessel should go.

(**c.**) So far as local custom is concerned, the custom is in exact accord with the terms of the International Regulations, the Federal Regulations of Section 4233, and the Pilot Rules. Whether the custom is older than the regulations and rules or whether it is a custom that has grown out of the regulations and rules does not appear; but in one way or the other it is firmly established.

Mardon, the master of the *Plymothian*, says :

" In navigating narrow waters, ships coming up go one " way, and going down they keep the other. The *Victory* " was on the east side when she should have been on the west " *(Mardon, p. 268)*.

" I say from the time she (the *Victory*) got under way in " Hampton Roads up to Lambert's Point she ought to have " kept on the west side of the channel.

" Q. You say it was her duty, from the time she hove " anchor in Hampton Roads to Lambert's Point, to keep on " the west side of the channel ? A. Yes, sir.

" Q. And it was the duty of the *Plymothian*— A. Or any " other steamer to keep down the eastern side " *(Mardon, p. 268)*.

" Q. The only navigation (of the *Plymothian*) as far as the " helm was concerned, was to keep on the east side of the river ? " A. Yes, sir " *(Mardon, p. 269)*.

" A. The east side was our proper course. I looked down " there more especially to see that it was clear " *(Mardon, p. 270)*.

" Q. Your idea of your duty was, even if you were on the " west side— A. If I was on the west side and there was " nothing in the way I should keep in the mid-channel, and as " soon as I saw anything coming up I should keep on the east " side.

" What consultation did you have with the pilot on that " day in reference to going down the east side ? A. Had none.

" Did you express those views to him ? A. No, sir.

" Did he communicate to you what the rule was in regard " to the western side ? A. He did not communicate to me, " because he knew I knew as well as he did.

" Q. How did you acquire that information ? A. By ten " or twelve years in this country, being here several times and " at Newport News.

" Q. Your idea is— A. By the United States law a ship " going down--

" Q. State the law ? A. Coming up, leave the red buoys " on the starboad bow ; going down, keep the black buoys on " the starboard bow " *(Mardon, p. 577)*.

" Q. If you were coming up the channel from Hampton " Roads, and saw a vessel coming out from Lambert's Point " pier dock, which side of the channel would you assume that " vessel would take after she got steady ? A. Down the east " side.

" Q. You would expect her to go down the east side ? A. " Yes, sir ; and act accordingly " *(Mardon, p. 280)*.

Henley, the pilot of the *Plymothian*, and experienced in the waters of the river and Hampton Roads, testifies :

" Q. Why do you take the eastern side ? A. That is the " proper side for a man to take ; if it is clear, to take that " side.

" Q. And coming up vessels take the western side ? A. " Yes, sir.

" Q. That is the regular course of navigation in all chan- " nels ? A. Yes, sir.

" Q. Each vessel takes the starboard side ? A. Yes, sir " *(Henley, p. 372).*

Adherence to this custom in the Elizabeth River is so strong that, as appears by one of the *Victory's* witnesses, vessels going out from Lambert's Point on a flood tide not infrequently let go their anchors to prevent being carried over to the western side, and at other times, instead of depending upon their own resources, take a tug to straighten them in the channel *(Tweddle, pp. 325, 326).*

The rule was well known to Elcoate, the master of the *Victory.* He had frequently been in Norfolk before.

" Q. Why did you not take the western side of the channel, " then ? A. We don't want to go to the western side of the " channel when the channel is free—we have got the whole " channel free.

" Q. You have been in Norfolk before ? A. Been running " here ever since these last five years.

" Q. You had in mind the width of the channel there ? A. " Yes, sir ; and I have oftener passed down the port side than " the starboard side.

" Q. Don't commence on your defence. When you do that " it sounds as if you were guilty. You said you knew you " were entering the channel of which you knew the width ? A. " Yes, sir.

" Q. And you knew that channel was a long course to Nor- " folk—several miles ? A. Yes, sir.

" Q. And you are acquainted, I suppose, with the rule of " the road that in rivers and narrow channels the vessel bound " down shall go to the right, and the vessel bound up shall " go the right ? A. Yes, sir, where practicable " *(Elcoate, pp. 151, 152).*

The pilot of the *Victory* has been examined at length, but he does not raise a word of dissent against the proofs that both custom and law required him to proceed up the western side of the channel.

The strongest proof, however, that the *Victory* was wrong in going up the eastern side is found in the excuses which she immediately began to offer for being on that side.

In her log she gives the earliest indications of her defense on this point.

In her proofs she enters upon an elaborate justification. She claims that first she met a tramp steamer, which gave the *Victory* a signal of two blasts, forcing her to pass starboard to starboard (*Elcoate p.* 131); that she then met three river steamers in close succession in the vicinity of Cranney Island, and that they each gave to the *Victory* a signal of two blasts, and forced her to pass starboard to starboard (*Elcoate, pp.* 131, 132); that by the time she was clear of these river steamers she met three schooners, one after the other, which compelled the *Victory* to hold the eastern side of the channel, and gave her no opportunity to cross to the western side (*Elcoate, pp.* 132, 133); that one of the schooners was still on the starboard bow of the *Victory* at the time of the collision (*Elcoate, p.* 150; *Nelson, pp.* 333, 338; *Gilbert, p.* 66).

How well do the proofs bear out this elaborate story told by the master of the *Victory?* Under cross-examination he is forced to admit that the tramp steamer was "*three miles*" ahead of the river steamers (*Elcoate, p.* 145).

If, as a fact, the tramp steamer did force the *Victory* to the eastern side of the channel, there was ample time for the *Victory* to regain her proper position on the western side; but it is at least doubtful whether the tramp steamer did anything of the kind.

The pilot of the *Victory* testifies:

"Q. Did you meet any foreign vessels on the way? A. Met
" one.
" Q. What was that? A. I don't recollect her name.
" Q. Laden? A. Yes, sir; going down; I don't know her
" name.
" Q. Give any signals? A. *I don't think she did;* I don't
" remember any" (*Nelson, p.* 330).

As to the river steamers, they were all small, light-draught vessels and were not bound by the limitations of the channel. It is extraordinary that a great steamer like the *Victory* should submit to be turned out of her proper position in the channel

by them, and, upon the proofs, it is apparent that nothing of the kind happened.

The navigators of two of the steamers have been examined, and have testified that they did not pass the *Victory* starboard to starboard, but that they passed her port to port *(Channel, p. 428; Harney, p. 433)*. It appears, therefore, that the river steamers had nothing to do with forcing the *Victory* to the eastern side of the channel.

It is significant that, although the pilot of the *Victory* states that he did starboard in order to pass the river steamers *(Nelson, p. 336)*, captain Elcoate testifies thus:

"Q. Did you have to change your helm for any of those "three river steamers? A. No, sir.

"And they did not have to alter theirs, apparently? A. "No, sir. * * *

"Q. But when you met those river steamers you were so far "on the eastern side of the channel? A. No, sir; we were on "the middle of the channel, as near as we could get. They "came down the western side.

"Q. You were so far to the east of them that you passed without changing your helm? A. Yes, sir" *(Elcoate, p. 152)*.

From the master's testimony it is clear that the river steamers did not force the *Victory* improperly. He had three miles, since passing the outward-bound tramp steamer, to choose his course in the channel, and he chose a course which did not involve any change of helm on his part when he met the river steamers.

Nor could the schooners have embarrassed the *Victory*. She should clearly have passed to the westward of them. As it was, she passed to the eastward of them. Her master claims that when he passed them the *Victory* was within forty yards of the eastern edge of the channel *(Elcoate, p. 133)*. It is apparent, however, that the schooners did not force him there. They were, indeed, on the eastern side of mid-channel, but they were so far on the eastern side that they furnish no excuse for the *Victory's* not going up the western side of the channel.

Bear in mind that the *Victory* was proceeding, according to her master's testimony, within forty yards of the eastern edge of the channel *(Elcoate, pp. 133, 149)*. He estimates that the schooners passed forty yards from him *(Elcoate, p. 133)*. On

this estimate the schooners must have been within eighty yards of the eastern edge of the channel. The channel is there three hundred yards wide, leaving two hundred and twenty yards to the westward of the schooners.

The pilot says that the *Victory* passed within fifty or sixty feet of the schooners *(Nelson, p. 338)*.

The first officer estimates that the schooners were from twenty to thirty yards away from the *Victory (Candlish, pp. 48, 49)*.

The third officer thought they were a hundred feet away *(Gilbert, p. 60)*.

The boatswain thought "all of them passed just a few yards" from the *Victory (Middleton, p. 103)*.

The second officer thought they were about ninety feet to the westward *(Stewart, p. 120)*.

The situation is this: that the *Victory*, according to her testimony, was within forty yards of the eastern edge of the channel, and the schooners were within from twenty to forty yards of the *Victory*, and, therefore, within sixty or eighty yards of the eastern edge of the channel, leaving nearly three-quarters of the channel clear to the westward. That clear portion of the channel was the *Victory's* proper water, and she should have occupied it.

The river steamers, as now appears from the proofs, passed the *Victory* port to port, and though they were not by their draft bound to the limits of the channel, they adhered to the rule and the custom that vessels going down should hold to the starboard side of the channel.

The schooners, being sailing vessels, were not in any wise within the contemplation of International Regulation 21; but, apparently in obedience to the local custom and in accord with the statutes, they, too, held to the starboard side of the channel.

The violation by the *Victory* of the regulation or rule or custom which called upon her to hold the starboard side of the channel imposes upon her the burden of showing that not only the collision did not result from such violation, but that it could not have resulted from such violation.

This burden is heavier than she can bear, and she must be condemned.

Mr. Marsden says:

"The re-enactment of the starboard side rule and its in-
"sertion in the regulations are of the utmost consequence to
"seamen. Any person in charge of a ship who navigates her
"on the wrong side of a narrow channel, besides being guilty
"of a misdemeanor, will almost inevitably subject himself and
"his owners to liability for any collision occurring when he is
"on his wrong side, unless it is proved that his being on the
"wrong side was unavoidable."

Marsden on Collisions, 2d Ed., p. 406.

It may be noted that the rule of the road is not to be treated as the sole criterion of negligence; but, before the vessel violating the rule can be excused from full responsibility for a collision, she must show that the other vessel might still, by due diligence, have avoided the collision.

C. The *Victory* should have maintained a proper lookout. No one was regularly assigned to the duty of lookout. Recognizing the obligation to carry a lookout, the master of the *Victory* assumes to fill the position. He says:

"A. I was on the bridge in command—on the lookout. Q.
"To whom did you report? A. To the pilot" *(Elcoate, p.* 134*)*.

"Q. And when you make oath in your libel that 'during
"'the voyage the master and a licensed Virginia pilot were in
"'command, and there was a lookout properly stationed,' you
"have reference to yourself? A. Yes, sir; I was the lookout.

"Q. So that in that sentence the word 'master' and the
"word 'lookout' refer to one and the same person? A. Yes,
"sir" *(Elcoate, pp.* 147, 148*)*.

The duties of the lookoat were discharged in just the manner that would naturally be expected from such an arrangement.

The master heard, or, rather, saw, the *Plymothian's* whistles. He saw "two puffs of steam about fifteen seconds apart
"—too far apart to be the same signal" *(Elcoate, p.* 154*)*. And he took it to be "two signals of one blast each" *(Elcoate, p.* 154*)*. And he understood by that that the *Plymothian* was directing her course to "starboard" *(Elcoate, p.* 154*)*.

Seeing these things, and knowing what they meant, he should, if he was a diligent lookout, have reported them to the

pilot. Certainly, if they had been so reported to the pilot, the pilot would not have persisted in holding the eastern side of the channel, or would, at any rate, have earlier stopped and reversed. But the master, apparently, reported nothing.

The pilot says :

"Q. You say you relied on the captain ; what did he tell "you? A. Didn't tell me anything.

"Q. Nothing was said to you about the *Plymothian's* "whistle, or the steam from the *Plymothian's* whistle ; no talk "at all on the subject? A. No, sir.

"Q. You didn't consider the *Plymothian's* whistles at all, "then? A. I didn't know she was blowing at all. * * *

"Q. You didn't know, and had no information, that the "*Plymothian* was blowing any whistles, or trying to blow any "whistles; that is right? A. Yes, sir.

"Q. And the captain didn't say anything to you about it, and "you didn't say anything to him about it? A. I asked him "to look out for him.

"Q. But he didn't say anything to you about her whistles? "A. I don't think he did.

"Q. Did you say anything to him about the *Plymothian's* "movements? A. No, sir" *(Nelson, pp. 342, 343).*

D. The *Victory* should have stopped and reversed her engines earlier than she did.

The claim of the *Victory* is that she blew a signal of two blasts to the *Plymothian*, and that the *Plymothian's* reply was "understood differently by different parties, the master of the "*Victory* taking it to be two whistles, and others not under-"standing whether it was one or two" *(Petition, Art. 2, p. 2);* and that thereupon the *Victory* repeated her signal of two blasts, and the *Plymothian*, instead of regarding it, ported her helm and swung herself across the channel, and crossed the bows of the *Victory (Petition, Art. 3, p. 2).*

The *Plymothian* produced many witnesses who testified positively that the *Plymothian* gave the first signal, and that it was a signal of one blast; but, in considering the charge against the *Victory*, that she should have earlier stopped and reversed, only the proofs coming from her own deck will be referred to, and they are sufficient to condemn her.

It was certainly the duty of the *Victory*, as soon as risk of collision arose, to stop and reverse. This is so either by the statutes or by the Pilot Rules.

The statute provides:

"RULE TWENTY-ONE. Every steam vessel, when approaching "another vessel, so as to invoke risk of collision, shall slacken "her speed, or, if necessary, stop and reverse."

U. S. Revised Statutes, § 4233.

This rule has received the careful consideration of Courts and of writers.

Marsden on Collisions, 2d Ed., 381–397.
The Khedive, Law Rep., 5 App. Cases, 876.
The Beryl, Law Rep., 9 Prob. Div., 137.
The Celo, Law Rep., 14 App. Cases, 670.
The Knight, 43 F. R., 895.
The North Star, 43 F. R., 807.
The Aurania, 29 F. R., 124.
The Adriatic, 107 U. S., 512, 515.
The Frisia, 28 F. R., 249.
The Memnon, 6 Aspinall, 317, 488.

The Pilot Rules provide:

"RULE III. If, when steamers are approaching each other, "the pilot of either vessel fails to understand the course or "intention of the other, whether from signals being given or an-"swered erroneously, or from other causes, the pilot so in doubt "shall immediately signify the same by giving several short "and rapid blasts of the steam whistle, and if the vessels shall "have approached within half a mile of each other, both shall "be immediately slowed to a speed barely sufficient for steer-"age-way until the proper signals are given, answered and "understood, or until the vessels shall have passed each "other" *(Record, p. 431).*

When the *Victory* blew a signal of two blasts, she was bound, if the *Plymothian's* answer was erroneous or it was not understood, to immediately give several short and rapid blasts of her whistle.

According to the petition filed by the *Victory* the answer from the *Plymothian* was not understood by the *Victory*. The *Victory* was bound then to signify that fact by giving her alarm blast.

The proofs do not agree with the petition, but they do not make the position of the *Victory* any better. While the petition says that the master of the *Victory* understood the *Plymothian's* reply to be two whistles, the master's testimony

shows that he understood those two whistles to be *two separate and distinct signals* from the *Plymothian*.

"Q. As I understand it, you saw two puffs of steam? A. "Yes, sir.

"Q. About fifteen seconds apart? A. Yes, sir.

"Q. That would be too far apart to be the same signal? "A. Wasn't the same signal.

"Q. If anything, it was two signals of one blast each? A. "Yes, sir; that is what I took it to be.

"Q. You took it to be two signals of one blast each? A. "Yes, sir.

"Q. And you know the rule of the road that a signal of "one blast means she is directing her course to starboard? "A. Yes, sir.

"Q. And after a time you saw she was actually directing "her course to starboard? A. Yes, sir" *(Elcoate, p. 154)*.

Upon the proofs, therefore, it is apparent that the *Victory* instantly got a cross-signal from the *Plymothian*—a cross-signal that involved risk of collision, and she was bound to instantly stop and reverse. Instead of that she proceeded on her course, and repeated her signal of two blasts.

In fact, the risk of collision was apparent to the navigators of the *Victory*, independent of any signals the *Plymothian* gave.

The first officer of the *Victory* testifies that he saw the *Plymothian* crossing the *Victory's* course under a port helm, and that he "then heard the captain say to the pilot, 'That ship has ported her helm'" *(Candlish, p. 56)*.

He further testifies:

"Q. You heard your captain say she was porting; when "did you hear him say that? A. Just before he blew the "second whistle" *(Candlish, p. 56)*.

If Candlish saw the *Plymothian* under her port helm before the *Victory's* second signal was blown, the pilot and master of the *Victory* must have seen the same thing; and instead of persisting in their signal of two blasts, they should have instantly stopped and reversed.

When did they reverse? Candlish says that the reversing signal was given "a minute or so" after the second signal of the *Victory (Candlish, p. 51)*. The master says that half a minute after the second signal he stopped his ship, and then

gave three blasts of the whistle, and then rang his engines to go astern (*Elcoate, p.* 136). The half minutes and minutes were very precious at that time, and the very highest degree of vigilance and diligence was to be required from the *Victory*. She would have been able to overcome her headway if she had reversed in the first moment of danger. In proceeding on her course she delayed until too late, and when she finally attempted to avoid the collision by reversing she could not control her speed, and she cut fifteen inches into the heavy iron stringer plates of the *Plymothian* (*Quigley, pp.* 420, 421).

Second.

THE PLYMOTHIAN, BY HER FAULTS, CAUSED OR CONTRIBUTED TO THE COLLISION.

A. The *Plymothian* should have maintained a proper lookout.

She had no one regularly stationed as lookout.

Neither her master nor her pilot heard more than one signal of two blasts from the *Victory* (*Petition, pp. 11, 13. Marden, pp. 265, 271. Healey pp. 363, 372*).

It is entirely clear that two such signals were blown. Aside from the proofs that come from the *Victory's* witnesses, several of the witnesses produced on behalf of the *Plymothian* testified to the fact that the *Victory* twice blew a signal of two blasts.

The master of the *Mary and Joe*, standing on the dock at Lambert's Point, says that the *Plymothian*

"blew one long whistle to the steamer *Victory* coming up; the "*Victory* answered with two; the *Plymothian* a little while "afterwards blew one more which was answered by two, and "the *Plymothian* then blew three whistles, and must have "went back on his engine" (*John I. Clarke, p. 388*).

The master of the *Pioneer*, lying near buoy 9, testifies:

"Q. And you saw and heard the *Plymothian* blow one "whistle and heard the *Victory* answer with two? A. Yes,

" sir, and shortly after that the *Plymothian* blew one again, a " long whistle, that was answered with two from the *Victory*" *(Joseph M. Clarke, p. 401).*

The master of the *Lumberman*, coming out of Tanner's Creek, says :

" The *Plymothian* sounded her one long blast of the whistle " and waited, I suppose, an interval of about, as near as I can " remember, two or three minutes, which the *Victory* answered " with two blasts of a steam whistle, and the *Plymothian* " waited again about the same length of time, and blew her " long blast of the whistle, and the *Victory* answered with " two, the same " *(Wynne, p. 404).*

The master of the *Commodore*, lying near Lambert's Point, and further from the *Victory* than was the *Plymothian*, testifies :

" I heard him [the *Plymothian*] blow just as soon as he " hauled around the buoy and straightened up. He blew one " whistle. Of course, that was to the *Victory*. * * *

" Q. Did you see or hear anything from the *Victory?* A. " I saw the steam of two whistles, but never heard the whistles.

" Q. You saw the puffs of steam from the whistle but " never heard the sound? A. Never heard the sound at all.

" Q. What did the *Plymothian* do? A. Then a little while " after that, I suppose two or three seconds, he blew the one " whistle again. * * *

" Q. What did the *Victory* do then? A. The *Victory* blew " two; I heard those " *(Goodwin, pp. 373, 374).*

The learned District Judge says :

" On the question of lookouts I have been always exact- " ing, and I think both steamers were at fault in not having " had each a special lookout on duty " *(Opinion, p. 455).*

Not one of these witnesses, all of whom have been produced and examined on the part of the *Plymothian*, was as advantageously situated for noting the signals of the *Victory* as would have been a regularly appointed lookout stationed on the forecastle or on the bridge of the *Plymothian*.

That the *Plymothian* was in fault in not having a lookout cannot be disputed; that that fault was one contributing to the collision and rendering her liable to the owners of the cargo is equally clear.

She was proceeding down narrow waters alive with vessels, and her master and pilot on the bridge were engaged in the pleasing, but perhaps too engrossing, courtesies of extending salutes and bidding farewell to the friendly craft about them *(Mardon, p. 264; Henley, p. 364)*.

It was especially important that some one should be stationed forward burdened with no duties of courtesy, and relieved from all social obligations, and whose sole duty should be to watch for and report the movements and signals of vessels coming up the river.

It has been truly and graphically said:

"The lookout's duty is distinct and different from that of "the navigator. He is in a different position on deck, his hand "and eye are differently occupied; his work and duty is "different as that of one man can well be from the work and "duty of another. The lookout of a ship is its eyes and ears; "without him she is blind and deaf. There is close and re- "sponsible relation between him and the pilot. His eye con- "stantly and searchingly scans the face of the water before "and on either bow of the ship; his voice is prompt to warn "off every object that presents itself to the vision."

The Manhasset, 34 Fed. Rep. 408, 411.

It is impossible for the *Plymothian* to say that if there had been a lookout stationed for the special purpose of watching for vessels and their signals he would not have heard all the signals that the *Victory* gave. It is equally impossible to say that if the pilot of the *Plymothian* had heard the signals which the *Victory* gave, or if it had been reported to him by a lookout, he would not have earlier recognized his danger. Recognizing his danger he would have assured safety either by yielding to the demands of the *Victory*, unreasonable as they were, or by slowing, stopping and reversing his engines, and keeping out of collision.

Under the provisions of Pilot Rule III, the receipt of a cross signal imposed upon the *Plymothian* the instant duty of blowing alarm signals and the further duty, as the vessels were then within half a mile of each other, of slowing her engines.

But the cross signal, freighted with such import, was not heard by the *Plymothian*, and it was not heard because she had no lookout.

In consequence, she did not blow alarm signals; she did not slow her engines.

It was error in the District Judge to hold that the absence of a lookout did not contribute to the collision *(Opinion, p. 455)*.

The Circuit Court of Appeals in holding the *Plymothian* in fault, do not especially assign fault in the matter of her failure to maintain a lookout, and in this respect there is error.

We submit that, as matter of fact, it is proved that the absence of the lookout and the consequent failure of the *Plymothian* to hear the cross-signal of the *Victory*, did contribute to the collision.

Aside from the question of fact, however, the rule of law in respect to the omission of a specific duty is not fairly recognized by the learned District Judge. He says that because it does not appear that the absence of the lookout contributed to the collision he will not hold the *Plymothian* liable.

The rule, however, is that when a clear duty is omitted the burden rests upon the negligent vessel of establishing affirmatively that the omission could not have contributed to the collision.

> " In such a case the burden rests upon the ship of showing " not merely that her fault might not have been one of the " causes, or that it probably was not, but that it could not have " been."
>
> *The Pennsylvania, 19 Wallace 125.*
> *The City of Washington, 92 U. S. 31, 36.*

No burden rests in this case upon the cargo to establish that the omission of the *Plymothian* did in fact contribute to the collision.

The learned District Judge bases his conclusion upon the fact that the *Victory* blew her first cross signal when half way between Buoy No. 7 and Craney Island Light, or

> " more than a thousand yards from the *Plymothian*, before any " stress of circumstances arose to require of her a violation of " the rule of navigation which she was faithfully adhering to " *(Opinion, p. 455)*.

The vessels were not in fact a thousands yards apart at that time for the *Plymothian* had already proceeded some distance down the river; but even if they had been a thousand yards apart they were when their respective rates of speed are con-

sidered, distant from each other less than three minutes of time. Under cross signals, if such had been recognized, it was the duty of the *Plymothian* to act instantly for safety; a duty which was recognized by her when at a later stage she did hear a cross signal from the *Victory*.

U. S. Revised Statutes, Section 4323, Rule 21.
Pilot Rule III.
The Baltimore, 56 Fed. Rep. 125.
The Knight, 43 Fed. Rep. 895.
The Aurania, 29 Fed. Rep. 127.
The Frisia, 28 Fed. Rep. 249.
Marsden on Collisions, 2nd Ed. 381–397.

B. The *Plymothian* should have blown danger singals and should have stopped and reversed her engines earlier than she did.

If the *Plymothian* had heard the first signal of two blasts which the *Victory* blew she would have stopped and reversed then, and if she had stopped and reversed then she would have avoided the collision.

That cross signal, which she should have heard, and which if she had carried a lookout she presumably would have heard, created one of the "special circumstances" contemplated by Rule 24 of § 4233.

The duty rested upon her even before the last cross signal came and as soon as her signals were disregarded by the *Victory* to promptly blow danger signals and take measures by stopping and reversing her engines to avoid collision.

Pilot Rule III. of the Supervising Inspectors provides as follows:

"If, when steamers are approaching each other, the pilot "of either vessel fails to understand the course or intention of "the other, whether from signals being given or answered er- "roneously, or from other causes, the pilot so in doubt shall "immediately signify the same by giving several short and "rapid blasts of the steam whistle, and if the vessels shall "have approached within half a mile of each other, both shall "be immediately slowed to a speed barely sufficient for steer- "age way until the proper signals are given, answered and "understood, or until the vessels shall have passed each other" *(Record, p. 431).*

The *Plymothian* claims in her petition that she three

times blew a signal of one blast to the *Victory*, and that she received no reply from the *Victory* until after the third blast. Her petition alleges :

" Almost immediately upon clearing said buoy No. 9 a " steamer was observed in the Elizabeth River coming up and " almost abreast of Craney Island Light house at a rapid " speed, which afterwards proved to be the *Victory ;* that im- " mediately one blast of the *Plymothian's* steam whistle was " sounded loud, clear, and distinct to the said steamer ; that " no response was given to said signal, which was twice re- " peated at short intervals of time, when finally an answer was " sounded by the *Victory*, and then the cross signal of two " whistles was heard." *(Petition, pp. 11, 12).*

Few of the witnesses examined on behalf of the *Plymothian* heard more than two whistles from her ; but the three signals alleged in the petition are supported in a measure by the master, the pilot, and the first officer.

Mardon, the master, states that when one hundred yards below Buoy No. 9 he gave one blast, to which there was no reply, and that " from a minute to a minute and a half " later he gave a second signal, to which there was no reply ; and that " about a minute to a minute and a half " still later he gave a third signal, to which he received a cross signal *(Mardon, p. 265).*

The pilot, Henley, testifies that the *Plymothian* gave two signals to which there was no reply, and that then the master of the *Plymothian* said to him " Pilot, what is that fellow " doing ? " And that then the *Plymothian* blew one more signal and received in reply the cross signal, and that thereupon the danger signals were blown and the engines reversed. *(Henley, p. 361).*

The particular circumstances which led to the master's remark " Pilot, what is that fellow doing ? " appears later, when Henley testifies, in speaking of the *Victory :*

" He starboarded a little for me, but didn't come up straight " for me, and as I saw him altering his course I blew him a " signal and he blew two whistles, and I blew the danger signal " and reversed the ship." *(Henley, p. 363).*

Still again the pilot of the *Plymothian* testified that he observed that the *Victory* was starboarding prior to the time that he blew his last signal of one blast to her.

" Q. Pilot, as I understand it you blew three single blasts " as signals ? A. Yes sir.

" Q. The first to indicate that you were going down the " eastern side of the channel ? A. Yes sir.

" Q. And the second one was a repetition of that ? A. " Yes sir.

" Q. It was after blowing that second one that you saw the " *Victory* port a little so as to show her port side ? A. A little " more, yes sir.

" Q. And that porting was an incident to the course of the " channel ; if he followed the channel he would naturally port " a little at the point where she was ? A. Yes sir.

" Q. At the same time it tended to accord with the move- " ment which you had started ? A. Yes sir.

" Q. But after a little you saw she had steadied and was " starboarding ? A. Yes sir.

" Q. And you blew the third signal ? A. Yes sir and she " answered with a signal of two.

" Q. And you blew the danger signal and she blew the " danger signal shortly after ? A. Yes sir.

" Q. That is a history of the signals ? A. Yes sir." *(Healey, pp. 371, 372).*

The pilot, who was specially charged with the navigation of the vessel *(Mardon, p. 361)* thus observed that the *Victory* was starboarding after he had twice blown to her a signal requesting her to port.

This was explicit notice to him that either the *Victory* had not heard, or that she was disregarding his signal of one blast.

This was another " special circumstance " which called into operation Rule 24.

What was he then bound to do ?

Under the provisions of Pilot Rule III he was bound to blow the short rapid blasts of a danger signal and to slow his engines.

Under Rule 21 of Section 4233 he was bound to stop and reverse.

What *did* he do ?

He, on his part, showed a bit of stubbornness and, instead of obeying the statutes and the rules, he repeated his signal of one blast, blowing it for the third time, and did not, until a cross signal was heard, attempt to perform the duties put upon him by law.

Except for this stubbornness, the collision would have been avoided.

The *Plymothian* cannot meet the difficulty by asserting that she reversed "four minutes" before the collision.

It is, indeed, a fact that her engine-room log contains the entries "Full speed astern 4:10 P. M. Ship struck 4:14 P. M." *(Exhibit A, p. 282).* The entries are supported by the testimony of the engineers *(Scullard, p. 169; Cronquist, pp. 175, 176).* The deck officers adopted the same estimate *(Mardon, p. 265).*

Circumstances make it certain, however, that the *Plymothian* did not reverse for four minutes, and any attempt on her part to establish such a period by specific measurement of time tends to throw discredit upon her whole story. If we accept the statement as an unmeasured informal erroneous estimate it is as far as we can go.

Mardon estimates that the distance separating the vessels when he observed the *Victory* starboarding was "from 200 to 300 yards" and that "after that" the *Plymothian's* danger signals were blown and her engines reversed. *(Mardon, p. 265).*

The pilot, Henley, testifies that his vessel ran only "about 300 feet" from the time she blew her danger signals, at which time she reversed, up to the time of the collision. *(Henley, p. 361).*

This was scarcely more than one length of the *Plymothian*, and it was a matter of seconds, not of minutes, for her to cover such distance.

C. The *Plymothian* was in fault for persisting in porting after she saw that the *Victory* was starboarding.

It is true that porting was the right measure for both vessels to take originally. But when, through misunderstanding or through fault, the *Victory* starboarded and was seen to be starboarding, the *Plymothian* had no right to persist in porting. The *Plymothian* not only ported and persisted in porting, but she hard aported after seeing that the *Victory* was starboarding.

Her master testifies:

"We had been steering down the east side of the channel "until we saw a collision was likely, and then we put the "helm *hard aport* when we saw him come up on his starboard "helm.

"Q. How near was the *Victory* to you at that time? A. "It is a little bit hard to judge of distance; but I should say "from 200 to 300 yards.

"Q. Just continue to describe what occurred *after* that? "A. We blew the whistles and put the engines full speed "astern." *(Mardon, p. 265).*

The *Plymothian* cannot escape responsibility by pleading the gross faults of the *Victory*.

The *Beryl* collided with the *Abeona*. Lord BRETT in considering the application of the statutory rules to the *Abeona*, said:

"The *Abeona* did everything that was wrong; and then the "question arises, Did the *Beryl* break any of the rules? "* * * The *Abeona* no doubt ought to have acted, but she "did not act. She was obstinately going on. What ought the "officer on board the *Beryl* to have done then? He had a "right to think she would not have continued her obstinacy. "* * * With great reluctance, the conduct of the *Abeona* "having been as bad as it could be, the officer of the *Beryl* "having been put into a difficult position by the obstinate "folly and wickedness of the Abeona, all that can be said is, "as was said in the Khedive, that he did not do that which "the Act of Parliament declares and enacts he must do, (for "although he did it, he did not do it at the right time), and "for this pardonable, excusable and slight fault, I feel bound "to say his owners are liable for this collision equally with "the owners of the *Abeona*."

The Beryl, Law Reports 9 Prob. Div. pp. 137, 142, 144.

The case of the *Plymothian* is by no means as clean as was that of the *Beryl*. She was proceeding through narrow and frequented waters, without a regularly stationed lookout. Her navigators failed to note at all the cross signal of the *Victory*; and though they saw that the *Victory* was on the eastern side of the channel, and though they heard no response to their signals, and though they saw that the *Victory* was starboarding, they nevertheless persisted in going down the eastern side, and in attempting it, forced their way against the *Victory* until they did hear the second cross signal.

Third.

THE PLYMOTHIAN IS NOT RELIEVED FROM RESPONSIBILITY BY THE TERMS OF HER BILLS OF LADING.

By stipulation made in the cause, the fact is admitted that the cargo of the *Plymothian* consisted of 3682 bales of cotton shipped at Galveston, Texas, to be delivered at Liverpool. It is further admitted that 1671 bales thereof were shipped on the *Plymothian* under bills of lading of the Texas-European Steamship Line, and that the remaining 2011 bales were shipped from interior points on through bills of lading given by the inland carrier to the shipper, covering transportation via Galveston to European destination.

The cotton, under these last mentioned bills of lading, upon reaching Galveston, was delivered by the inland carrier to the *Plymothian*, whose master, upon receiving the bales of cotton on board issued therefor other bills of lading or receipts to the inland carrier *(Stipulation, pp. 483, 484)*.

Specimen copies of the three forms of bills of lading follow the stipulation.

A. The bills of lading issued by the Texas-European Steamship Line covering the 1671 bales shipped in Galveston and directly upon the *Plymothian* contained the following provisions:

"The vessel shall not be liable for loss or damage occa-
"sioned by causes beyond her control, by the perils of the sea
"* * * by collisions, stranding or other accidents of
"navigation of whatsoever kind (even when occasioned by the
"negligence, default or error of judgment of the pilot, master,
"mariners or other servants of the ship owner not resulting,
"however, in any case, from want of due diligence by the
"owners of the vessel or by any of them, or by the ship's
"husband or manager" *(p. 487)*.

And

"This contract shall be governed by the law of the flag of the
"vessel *carrying* the goods, except that general average shall be
"adjusted according to York-Antwerp rules. In accepting this
"bill of lading, the shipper, owner and consignee of the goods
"and the holder of the bill of lading, agree to be bound

" by all its stipulations, exceptions and conditions, " whether written or printed, as fully as if they were all signed " by such shipper, owner, consignee, or holder, any custom of " the port notwithstanding." *(p. 488).*

The Texas-European Line ran from Galveston to Liverpool, Havre and Bremen, and was of no defined nationality. J. Moller & Company of Galveston signed the bills of lading and described themselves as " agents or charterers of the " steamer *Plymothian* " and, in receipting for the cotton they stipulated that it should be

" transported by said steamer *or any other steamers* of the " Texas-European Steamship Line from the Port of Gal- " veston." *(p. 485).*

The bills of lading further provided :

" The vessel has liberty in the event of her being full of " cargo or putting back to any port or otherwise being pre- " vented from any cause from proceeding on the ordinary " course of her voyage, to transship the goods *by any other* " *steamer* or steamers."

B. The form of bills of lading issued by the inland carriers is shown by the specimen, pages 494–498.

It was issued by the Gulf, Colorado & Santa Fe Railway Company at Ardmore, Indian Territory, covering fifty bales of cotton through to Liverpool, England. It was No. 48, Contract No. 287.

It contained this clause :

" The property covered by this bill of lading is subject to " all the conditions expressed in the customary forms of bills " of lading in use by said steamship or Steamship Company at " time of shipment." *(p. 494).*

No steamship or Steamship Company, had, however, been referred to earlier. The first seven numbered clauses of the bill of lading related to the exemptions and conditions of the Railway Company. The eighth clause was as follows :

" (8). And it is further agreed that the property shall be " transported from the port of Galveston, Tex., to the port of " Liverpool, Eng., by the steamer *Sandfield* with liberty to ship " by *any other steamship or steamship company*, subject to the " following terms and conditions, viz. :

"To be delivered from the ship's deck, where the ship's re-
" sponsibility shall cease, the acts of God, the Queen's
" enemies, pirates, robbers, thieves, vermin, jettison, barratry
" of masters or mariners, misfeasance, error in judgment, neg-
" ligence or default of pilot, master, mariners, engineers, of
" other persons in the service of the ship (whether in navi-
" gating the ship or otherwise), restraints, of princes, rulers or
" people, * * * or any other accidents of seas, land,
" rivers and steam navigation of whatever nature or kind
" soever excepted, however caused or originating (whether any
" one or more of such exceptions arise, occur, or in any way
" occasioned from or by the negligence, default or error in
" judgment of the masters, mariners, engineers, or others of
" the crew, or of any of the servants or employes of the ship
" owners, or otherwise however); and with liberty during the
" voyage to call at any port or ports, to receive fuel, to load
" or discharge cargo, or for any other purpose whatever; to
" sail with or without pilots, to tow and assist vessels in all
" situations; and in the event of said steamer being full of
" cargo, or putting back to any port, or being otherwise pre-
" vented from proceeding in the ordinary course of her voy-
" age, to tranship the goods *by any other steamer (pp. 495, 496).*

Near the foot of the bill of lading appears the following:

" Attention of shippers is called to the Act of Congress of
" 1851: 'Any person of persons shipping oil of vitriol, un-
" 'slacked lime &c &c * * * * shall forfeit to the
" 'United States one thousand dollars.'" *(p. 497).*

Upon arrival of the cotton in Galveston it was delivered by the inland carrier not to the *Southfield*, but to the *Plymothian*; and the master of the *Plymothian* issued a receipt, referring in terms and specifically to the bill of lading issued by the Railroad Company at Ardmore. That receipt contained, among other conditions, this provision:

" The carrier shall not be liable for loss or damage occa-
" sioned by causes beyond his control; by the perils of the
" sea, rivers, canals and navigation; by fire from any cause or
" wheresoever occurring; by barratry of the master or crew;
" by enemies, pirates or robbers; by arrest and restraint of
" princes, rulers or people; riots, strikes or stoppage of labor;
" by explosion, bursting of boilers, breakage of shafts, or any
" latent defect in hull, machinery or appurtenances; by col-
" lisions, stranding or other accidents of navigation of what-
" soever kind (even when occasioned by the negligence, de-

" fault or error in judgment of the ship-owner, not resulting, " however, in any case, from want of due diligence by the " owners of the ship or any of them, or by the ship's husband " or manager), *(pp. 489, 490)*.

It also contained the provision :

" This contract shall be governed by the law of the flag of " the vessel *carrying* the goods, except that general average " shall be adjusted according to York-Antwerp Rules, 1890." *(p. 492)*.

C. It will be noted that the bills of lading contained provisions obnoxious to the public policy of the United States.

It has been said by this court that it is against public policy to permit a carrier to exempt himself from the consequences of the negligence of his servants.

Railroad Company vs Lockwood 17 Wallace, (U. S) 357, 378.

The rule has been extended from the strict applications resting upon the carrier by land to cover those of a carrier by sea.

Liv. & G. W. Steam Company vs Phenix Insurance Company (The Montana) 129 U. S. 379.

The bills of lading were issued nearly two years before the passage of the Harter Act.

27 U. S. Statutes at Large, p. 445, Ch. 105.

The carrier sought to avoid the rules of our existing national public policy by a provision that the contract shall be construed by the "law of the flag of the vessel carrying the goods." That, and kindred provisions have been over-ruled in our courts as invalid as embodying attempts at evasion by the carrier.

The Energia, 56 Fed. Rep. 124.
Lewisohn vs National S. S. Co. 56 Fed. Rep. 602.
The Iowa, 50 Fed. Rep. 561.
The Brantford City, 29 Fed. Rep. 373.
The Guildhall, 58 Fed. Rep. 796.
The Glenmavis, 69 Fed. Rep. 472.

In an English case where the question of applying foreign law was considered, Mr. Justice FRY said :

" It appears to me, however plain on general principle, " that the court will not enforce a contract against the public " policy of the country wherever it may be made; it seems to " me almost absurd to suppose that the courts of this country " should enforce a contract which they consider to be against " public policy, simply because it happens to have been made " somewhere else."

Rousillon vs Rousillon, L. R. 14 Chancery Div 351, 369.

And in another English case the court said :

" The question to be considered is not merely whether the " contract sought to be enforced is valid according to the laws " of the country in which it was entered into, but whether it is " consistent with the laws and the policy of the country in which " it is sought to be enforced."

Hope vs Hope, 8 de Gex MacN. & G. 731, 743.

The true test applied by this court to determine the validity of any provision in a bill of lading, is the measure of what is " just and reasonable in the eye of the law."

Railroad Company vs Lockwood, 17 Wallace, 357, 380, 382.

We submit that it is not "just and reasonable" to make a provision for the application of the "law of the flag of the vessel " *carrying* the goods."

Even in respect of the 1671 bales of cotton shipped at Galveston and receipted for by the Texas European Steamship Line for proposed transportation on the *Plymothian*, there was no declared specific national law provided for.

While the *Plymothian* was named, her nationality was not given, and the bill of lading in terms reserved to the carrier the right to transport the cotton " by said steamer or *any other* " *steamers* of the Texas-European Steamship Line."

The carriers were mere " charterers " of steamers, and they carried to Liverpool, to Havre, to Bremen. Presumably they carried by vessels of all nationalities.

At the convenience of the carrier the cotton, although the *Plymothian* was named, might have been shipped on any other steamer, or have been transshipped upon another steamer after original shipment on the *Plymothian (p. 485).*

However just and reasonable it might be to stipulate in respect of cotton bound to a foreign port that the contract should be construed by the law of the port of destination, it is not "just and reasonable in the eye of the law" to make a contract full of stipulations which are declared void by the public policy of the United States, and seek to validate them by invoking as enforcible law foreign principles indicated only by the flag of the accidental carrying vessel in whose selection the shipper has no controlling choice, and whose nationality is not discoverable.

In respect of the 2011 bales shipped at inland points by rail it will scarcely be contended that the clauses exempting the ocean carrier from the consequences of his servants' negligence are valid. The bills of lading issued to the shippers contain no provision subjecting the contract either to the law of any specified foreign country or to the law of the flag of the vessel carrying the goods.

There was indeed this provision:

"The property covered by this bill of lading is subject to "all the conditions expressed in the customary forms of bills "of lading in use by said steamships or Steamship Company "at time of shipment." *(p. 494).*

The steamer *Smalfield* was named as the steamer to perform the ocean carriage "with liberty to ship *by any other* "*steamship* or Steamship Company." *(p. 496)*

There was no intimation in the bill of lading that any foreign law was contemplated. On the other hand, the attention of shippers was called specifically to the Act of Congress of 1851, creating an implication at least that the laws of the United States would be applicable.

The circumstances that the Railroad Company, upon delivering the cotton to the ocean carrier *(Stipulation, pp. 483, 484)*, accepted a receipt from the master of the *Plymothian*, subjecting the contract to the law of the flag, cannot affect the shipper or his assigns. The master knew exactly under what limitations of authority the railroad carrier acted, for in his receipt he referred in terms and specifically to the inland bill of lading *(p. 498)*.

The greater portion of the cotton, to wit, 2011 bales, were shipped under inland bills of lading and are free from any question as to the application of the law of the flag.

Inasmuch as the *Plymothian* was only partly in fault for the collision, and carries at most only half the damage, it would afford her no relief if, in respect to the 1,671 bales shipped at Galveston, the Court should find the stipulation for the application of the law of the flag to be "just and reasonable," and therefore valid

Fourth.

THE CIRCUIT COURT OF APPEALS HAD THE POWER IN THEIR DISCRETION TO SO APPORTION THE DAMAGES AS TO THROW A GREATER PROPORTION THEREOF ON THE VICTORY THAN ON THE PLYMOTHIAN, AND THERE IS NO ERROR IN THEIR DECREE IN THAT RESPECT.

The principal amount of the cargo damages was about $72,000; of the damages of the *Plymothian* about $42,000; of the damages of the *Victory* about $14,500.

At the time the decree of the Circuit Court of Appeals was entered, the damages of the cargo, including interest, amounted to about $87,000; those of the *Plymothian* about $51,000; and those of the *Victory* about $17,500; or a total of $155,500. Of these total damages under an equal apportionment against the wrongdoers, about $78,000 would fall upon the *Victory*, of which she would bear $17,500 in the way of her own damages, leaving her to pay the further sum of $61,000. She is, therefore, under the terms of the decree of the Circuit Court of Appeals, required to pay $67,560, which is about $7,000 more than her half share.

The *Plymothian*, instead of paying $78,000, is required to bear her own damages of $51,000, and to pay to the cargo about $20,000, the aggregate charge against her being about $7,000 less than the one-half which she would bear under an equal apportionment.

Roughly, the *Victory* carries about fifty-five per cent. of the damages, and the *Plymothian* about forty-five per cent., a distinction which fairly marks their relative degrees of fault.

The Circuit Court of Appeals in their opinion say:

"The rule unquestionably is that when both vessels are in "fault, both must contribute to make good the damages (*The "Washington and the Gregory*, 9 Wall., 513; *The Connecticut*, "103 U. S., 710; *The Potomac*, 105 U. S., 630). And the "general rule, almost universal, is to divide the loss equally "among the guilty parties, with this qualification: that if one "party is exhausted before the person injured is fully indemni-"fied, the deficiency must be made up by the other party (*The "North Star*, 106 U. S., 17; *The Max Morris*, 137 U. S., 1; "*The Washington and the Gregory*, 9 Wall., *supra*; *The Ala-"bama and the Game Cock*, 92 U. S., 695.) But this rule "cannot be said to be inflexible. In *The Max Morris*, 137 "U. S., 1, the question was suggested before the Supreme "Court but it was not necessary to pass upon it. The Court "says: 'Whether in a case like this (mutual fault) the decree "'should be for exactly one-half of the damages sustained, or "'might, in the discretion of the Court, be for a greater or less "'proportion of such damages, is a question not presented for "'our determination on this record, and we express no opin-"'ion on it.'

"The application of an equal division of damages is said to "be the *rusticum jus*. Chancellor KENT applies to it that "term. *3 Kent Comm., section 231; Marsden on Collision, 2nd "Ed., page 133.* That is to say, it is an application of that "sense of fair dealing and of justice imbedded in our nature, "the conclusions of common sense, of a mind '*abnormis* "'*sapiens.*' If the spirit of the rule be adopted and the liabil-"ity of each vessel be measured by its degree of fault, exact "justice will be done by applying the stipulated value of the "*Victory* to the loss sustained by the cargo, and by requiring "the *Plymothian* to make up any deficiency, so that the cargo "owners obtain complete indemnity." *(p. 504).*

The Circuit Court of Appeals was properly impressed by the fact that the cargo had no share in the faults committed by the steamers, and that her owners were entitled to complete indemnity, *restitutio ad integrum. (Opinion, p. 504).*

While the more frequent practice in this country undoubtedly follows the rule of equal division, the result is often reached that a greater burden is thrown upon one vessel than upon another in order to afford complete indemnity to owners of cargo, or to other persons who have sustained damage, though free from fault themselves. Such instances have arisen when one of two faulty vessels was of insufficient value to pay

her full one-half. Then the other guilty vessel has been compelled to make up the deficiency.

The Washington and the Gregory, 9 Wall., 513, 516.
The Alabama and the Game Cock, 926, 695.
The Hartford and the Unit, 97 U. S. 323.
The Sterling and the Equator, 106 U. S. 647.

Aside from these instances where the greater loss has been thrown upon one vessel through accidental circumstances, it has not been unprecedented to make a decree imposing a heavier burden upon one because of her graver fault.

The Mary Ida 20 Fed. Rep. 741, 747.

And the rule had been freely applied in causes of admiralty torts other than collisions.

The Explorer 20 Fed. Rep. 135.
The Wanderer 20 Fed. Rep. 140.
The Max Morris 24 Fed. Rep. 860.

The case last cited was affirmed in the United States Circuit Court and in this Court.

The Max Morris 28 Fed. Rep. 881.
The Max Morris 137 U. S. 1.

The rule of equal apportionment of damages between two vessels whose respective faults have contributed to a collision was first adopted in this court in 1854 in the case of the schooner *Catharine*. Mr. Justice NELSON delivered the opinion of the court, and said:

"It becomes necessary to settle the rule of damages in a "case where both vessels are in fault.

"The question, we believe, has never until now come dis- "tinctly before this Court for decision. The rule that pre- "vails in the District Court and Circuit Courts we understand "has been to divide the loss.

"This seems now to be a well-settled rule in the English "Admiralty (citing several cases).

"Under the circumstances *usually attending these disas-* "*ters* we think the rule dividing the loss most just and equi- "table, and as best tending to induce care and vigilance on both "sides in the navigation."

The Schooner Catharine, 17 How., 173–177

That was the precedent in this country and it has been followed without discussion.

The precedent relies exclusively upon English cases. While the cases cited do show the well-settled rule in the English Admiralty to make an equal apportionment of damages such rule does not conform with the rule of other maritime nations.

Moreover it appears to have been originally adopted in England through error, or rather without correct knowledge of the general maritime law.

The statute of Great Britain provides that

> " In any cause or proceeding for damages arising out of a " collision between two ships, if both ships shall be found to " have been in fault, the rules in force in the court of admiralty, " so far as they have been at variance with the rules in force " in the courts of common law shall prevail."
>
> *Judicature Act 36 & 37 Victoria Ch. 66 Sec. 25 Subd. 9.*

The admiralty rule which has, under this statute, been enforced and which doubtless the legislators had in mind when they framed this statute, is the rule relieving the plaintiff who has been guilty of contributory negligence, so far as to authorize an equal apportionment of damages. For at the time of the passage of the statute, such was the fairly established usage of the English Admiralty court.

The authority commonly accepted in England for the equal division of damages in admiralty cases is the decision of Lord STOWELL, then Sir WILLIAM SCOTT, in the case of the *Woodrop Sims*, in 1815. In speaking of collision cases he said :

> " A misfortune of this kind may arise where both parties are " to blame, and where there has been a want of due diligence " or of skill on both sides ; in such a case the rule of law is that " the loss must be apportioned between them as being, as hav- " ing been occasioned by the fault of both of them."
>
> *The Woodrop Sims, 2 Dodson, 83, 85.*

Inasmuch as the *Woodrop Sims* was found solely in fault for the collision under consideration, there was no occasion to consider what rule of damages should be applied when both colliding vessels were in fault. The remark which we have quoted was not therefore pertinent to the decision of the case.

Mr. Marsden, a modern writer, in an article entitled " Two Points of Admiralty Law," published in July, 1886, in the Law Quarterly Review of London, Volume 2, page 357, pointed

out that Sir WILLIAM SCOTT did not in 1815 have sufficient authority to support the rule which he declared of apportionment as an admiralty rule.

The House of Lords adopted the rule, however, in 1824.

Hay vs. Le Neve, 2 Shaw's Scotch Appeal Cases, 395.

In the report of that case another decision of Lord STOWELL, made in 1816, who was still then Sir WILLIAM SCOTT, in the case of *The Lord Melville*, and not otherwise reported, is fully set forth. In the case of *The Lord Melville* Sir WILLIAM SCOTT had again laid down the rule of apportionment in cases where a collision had occurred by the common fault of both vessels, and declared it to be "the ancient rule of the admiralty."

In the same decision he stated what the rule would be in the case of a collision arising through mere misfortune, and in one occasioned by irresistible force of the elements; and in one occasioned by the misconduct of the navigators of only one vessel. But it is impossible to determine from the reported facts which rule was pertinent to the case under consideration.

MR. Marsden shows that the rule of equal apportionment, the *judicium rusticum* of the continent, had not up to that time, 1815, been ordinarily applied in England or on the continent, to cases of collision where both vessels were at fault, and that it was not, in respect of such collisions "the ancient rule of the admiralty."

It had been applied rather to cases of inscrutable fault where it was impossible to determine upon which vessel blame should rest, and to collisions brought about by inevitable circumstances.

In 1746 Sir HENRY PENRICE, a Judge of the English Admiralty, decided the case of the *Eagle vs. The Hopewell*, practically as one of inscrutable fault, and decreed

"That the loss of the said ship Eagle and cargo *from* "*the great contrariety of evidence was so uncertain* that he did "adjudge and decree the damages sustained by the loss of "said ship and cargo to be equally paid and borne by the "plaintiffs and defendants."

Admiralty Cases 1648–1840, published by W. Clowes & Sons, London, 1885.

In the same reports is found the case of the *Mary of Poole* and the *Mary of Weymouth*, decided by Sir CHARLES HEDGES, whose decree after stating that the accident was accidental—"by *casu fortuito*"—condemned the defendants in half damages. This is perhaps the first recorded instance in Great Britain of the application of the *judicium rusticum*, and it is singular that it is found in a case which was decided explicitly upon the ground, not of mutual fault on the part of the two vessels, but of the absence of fault on the part of either.

It is true that in 1789 Sir JAMES MARRIOTT applied the *judicium rusticum* of equal apportionment in the case of the *Petersfield*, which was a case of "both vessels at fault." The case is referred to in the decision of *Hay vs. Le Neve, 2 Shaw's Scotch App. Cases, 395, 402.*

But this same Sir JAMES MARRIOTT, in July of the same year, applied the same rule of apportionment in the collision between the *Resolution* and *Langdon*, which was not a case of mutual fault, but a case where he found that neither ship was in fault.

2 Law Quarterly Review of London, 357, 360.

In that same year too the Court of the Judges Delegates, upon appeal from the Admiralty, decreed an equal apportionment of damages, but upon the express ground that the two ships were "*equally* blamable."

The Friends Good Will 2 Law Quarterly Review of London, 357, 361.

It seems therefore that Sir WILLIAM SCOTT had not sufficient grounds, even if the practice of the English Courts alone was considered, for the declaration in 1815 of his dictum in the case of the *Woodrop Sims*, which has been followed in England ever since, and which has supported the line of decisions upon which this Court relied when in the case of the schooner *Catharine* they found "the well-settled rule in the English Admiralty" to be the rule of dividing the loss.

We find on the continent both in early times and to some extent in modern times the application of the *judicium rusticum*. But it is not associated with the cases of mutual fault.

Grotius says that it was introduced "*ob culpæ probandæ difficultatem*", which would be cases of inscrutable fault, or

such cases as are referred to in the present French Code as those in which there is "*doute dans les causes de l'abordage.*"
Code de Commerce, Art. 407.

It was in the cases of inscrutable fault and in cases of inevitable accident that the rule of apportionment found its earliest play.

The *Droit Maritime de la Hige Hanséatique, Recès de 1614*, provided:

"1. Lorsque deux navires font voile l'un contre l'autre, si "l'un ne peut éviter l'autre en telle sorte qu'ils en éprouvent "tous les deux des dommages, les deux patrons et les "deux équipages devront jurer que cela n'est point arrivé "avec premeditation, mais *par hasard*; et alors ils paieront "le dommage ensemble, soit que l'accident ait eu lieu de jour, "soit qu'il ait eu lieu de nuit.

"2. Lorsque l'accident aura été causé per force majeure, "les deux navires répareront le dommage, d'après la décision "d'arbitres." *Titre X.*

These rules called for apportionment in cases of inscrutable fault and called for a division, according to the judgment of arbitrators, when a disaster came through *force majeure*.

The *Supreme Droit Maritime de Wisby*, promulgated in 1676–87, provided:

"ART. 65. Si un navire cause des avaries à un autre par "abordage, et que l'on porte plainte contre celui qui a causé "le dommage, et que celui-ci consente à affirmer, sous "serment par les saints qu'il en a regret, et *qu'il n'a pu "empêcher le dommage qu'il a causé* il paiera la moitié des "avaries, et si'l ne fait point cette attestation sous serment "par les saints, il paiera la totalité du dommage."

This calls upon each of two colliding vessels to pay a moiety of the loss when *no fault* appears on either vessel; but places the whole damage upon that vessel whose master will not, under oath, declare himself free from fault.

Pardessus, in his collection of maritime laws, shows that by the judgments of Oleron the equal apportionment of damages was made when the collision occurred without the fault of either vessel:

"XV. Si un navire est ancré dans un port, et qu'avec la "marée un autre venant du dehors se heurte contre le premier, "de manière à l'endommager, et que, dans l'un et dans l'autre,

" il y ait des tonneaux de vins enfoncés le dommage total
" est supporté par moitié par chacun des navires et leur
" chargement, pourvu que le patron et l'équipage du navire
" qui a heurté l'autre, jurent sur les saints évangiles *que l'ac-*
" *cident est arrivé sans leur faute et volonté.* On a rendu cette
" décision, afin que l'équipage d'un vieux navire ne fût pas
" tenté de se mettre sur la voie d'un meilleur, dans l'espoir de
" se faire dédommager des suites de se choc, et qu'au con-
" traire la crainte de supporter la moitié du dommage n'ex-
" citât l'équipage à faire tous ses efforts pour se ranger hors de
" la voie."

Pardessus Lois Maritimes, 1, 334.

Cleirac, in commenting upon the judgments of Oleron, styled the rule of apportionment and the "*judicium rusticorum*" as being a practice followed by "arbitres, arbitrateurs & amiables compositeurs."

Cleirac, les Us et Coutumes de la Mer, p. 54.

Article 2 of the *Hamburg Seerecht*, touching of collisions, likewise provided when a ve3sel collides with and sinks another, should pay the full damage, unless the master of the master of vessel which remains afloat should swear that the collision happened *accidentally* (undankes gescheen is), in which event he should pay half the damages.

Pardessus, Lois Maritimes, 3, 348.

The *Customs of Amsterdam, Enchuysen and Stavern*, published in 1406, setting forth the maritime usages of Holland, imposed in Article 12 the same liability for half damages, but only in cases of involuntary or accidental collisions.

Pardessus, Lois Maritimes, 1, 412.

The *Dantzic Ship Laws*, as published in the Black Book of Admiralty, Volume 4, Edition of 1857, pages 348, 349, provided as follows :

49. "Item een scip vaert van Aemsterdamme iof van and-
" eren steden, dat den anderen aen seilde süns sondanckens,
" dat soude den scade half ghelden, maer dade hüt willens, so
" soude hi die, dat ander scip aen seilde, den scade alleene
" gelden."

which the compiler translates as follows :

" Likewise, a ship sails from Amsterdam or another place " (should it be) that it sails into another ship *without intention*, " it shall pay half the damage ; but should it have done it in- " tentionally the ship which has sailed into the other ship shall " pay all the damage."

When the Ordonnance de la Marine was proclaimed by Louis XIV in August 1681, it provided :

" ART. X. En cas d'abordage de vaisseaux, le dommage " sera payé également par les navires que l'auront fait et souf- " fert, soit en route, en rade, ou au port.

" ART. XI. Si toutefois l'abordage avait été fait par la " faute de l'un des Maistres, le dommage sera reparé par celuy " qui l'aura causé."

Valin, in commenting upon Article X, says :

" La decision de notre article est pour *tout abordage for-* " *tuit*, et qui n'a pu naturellement être évité soit en route, en " rade, ou au port."

Valin, Vol. 2, 478, Edition of Becane, 1841.

And later, in questioning whether fault should be attributed to both masters, he says :

" Dira-t-on que l'abordage doit être absolument imputé à " faute de la part des des deux maitres ? Mais á ce compte, ce " qui pourtant est une chimère, puis qu'il y a constamment des " abordages inévitables, et *qu'ils doivent tous être présumés tels,* " *s'il n'y a preuve contraire,* ce serait donc aux deux maitres " &c. &c." *p. 481*

In this Valin gives expression to the general view entertained in France that in the absence of proof of fault every collision should be deemed inevitable.

That is the spirit which governs the French courts at the present time in construing their existing statutes.

The present Code of Commerce of France provides :

" En cas d'abordage de navires, si l'évenement a été pure- " ment fortuit, le dommage est supporté, sans répétition, par " celui des navires qui l'a éprouvé.

" Si l'abordage a été fait par la faute de l'un des capitaines, " le dommage est papé par celui qui l'a causé.

" S'il y a doute dans les causes de l'abordage, le dommage " est reparé a frais communs, et par égale portion pour les " navires qui l'ont fait et souffert." *Article 407.*

It will be seen that this article provides that the vessel upon which damage has fallen shall bear the results of an inevitable accident; that if a collision has been caused by the fault of one vessel she shall pay the entire damage; and that if there is doubt as to the causes of the collision, the damage is to be repaired at common expense, through equal portions borne by the two vessels.

The Code does not specifically state how the damage shall be borne in cases where both vessels are at fault, but the courts find, under the provision which imposes upon the faulty vessel the burden of paying damages, authority to assess the damages against the two guilty vessels *in proportion to their respective faults.*

A modern French writer says:

"Le cas où l'abordage a été causé par la faute respective des "capitaines des deux navires n'est pas prévu par l'article 407 "du Code de Commerce. Par suite, les conséquences d'un "abordage de cette nature, notamment en ce qui concerne le "chargement doivent être réglées d'après les principes du droit "commun."

Fremont; Code de l'Abordage 98.

And again:

"Au contraire dans le cas de faute reconnue commune, "lorsqu'il y a une imputabilité à faire aux deux capitaines de "fautes réciproques qui ont causé l'abordage. Le droit "commun de l'article 1382 reprend son empire, et on doit "attribuer à l'un comme à l'autre la responsabilité du dommage, "proportionellement aux torts de chacun, sans qu'on puisse en "quoi que ce soit trouver dans les termes de l'article 407 une "atténuation quelconque a cette responsabilité (Rouen, 12 "janvier 1864, S. 71.1.181. Cass., 3 mai 1864, ibid, 15 novem-"bre 1871, ad notum. Aix, 15 decembre 1870, Journal de "Marseille, 71.1.70. Conseil d'Etat, 15 fevrier, 1872, S. "73.2.240. Cass., 30 juin 1879, S. 81.1.109; D. P. 81.1.172, "20 juillet 1880; S. 80.1.350; D. 81.1.172. Bordeaux, 10 "decembre 1887, Paud. fr., Jur., 88.2.64. Cass., 3 avril, 1886, "Ann. de droit com. 87.2.40.)

Code de l'Abordage, 163, 164.

And again M. Fremont says:

"En tous cas, les juges du fond ont toujours un pouvoir "souverain pour apprécier la mesure de la responsabilité des

" capitaines et partager le dommage (Cass., 20 juillet 1880, S.
" 80.1.350.)

Code de l'Abordage, 166.

The Court of Rouen, in rendering the decision of January 12, 1864, above cited, stated the principle which governed it very clearly as follows:

" Qu'une responsabilité *proportionnée* à la faute de chacun
" des deux capitaines doit peser sur eux-mêmes et sur leurs
" armateurs, que ce ne peut être le cas d'appliquer à la cause
" le § 1er de l'article 407 qui ne parle que du cas fortuit, et que
" le § 2 ne prévoit que la faute de l'un des capitaines ; il est
" évident que la même dispotiposition s'applique par les mêmes
" motifs en cas où les deux capitaines sont en faute, que dés
" lors *le devoir du juge est de rechercher le degré de la faute im-*
" *putable à chacun, de manière à proportionner la réparation du*
" *dommage commun suivant la gravité des fautes respectives.*"

France is by no means alone in this treatment of damages arising from mutual fault.

Belgium in its Code de Commerce provides specifically for a division proportionate to the gravity of the respective faults of the vessels.

§ 229. " S'il y a faute commise à bord des deux navires, il
" est fait masse des dommages, lesquels sont supportés par les
" deux navires dans la proportion de la gravité qu'ont eue les
" fautes respectivement constatées comme cause de l'événe-
" ment."

—*Code de Commerce, Livre* 2, *Titre* 8, § 229.

The International Scandinavian Code which furnishes the Sea Laws for Sweden, Norway and Denmark, makes similar provision in Article 220.

This Code was approved by King Christian IX of Denmark in April 1892, and in the same year was adopted in Sweden and Norway.

The official translation published in Copenhagen in 1893, reads:

ART. 220 " Whenever damage is done to ship or cargo
" through collision between ships and only one of these is in
" fault, this one shall make good all the damage occasioned.

" If both parties are in fault the court shall decide, taking
" the fault committed on each side into consideration whether
" and to what amount compensation shall be given by either
" party, or whether each party shall bear its own loss.

" In deciding the question as to which party has been in " fault, the court shall take into special consideration whether " or not there has been any time for deliberation."

ART. 221 " If a collision was caused by accident or it can " not be proved that it was due to any fault committed by " either party, each ship shall bear its own loss."

International Scandinavian Code, Ch. VIII.

The inequitable rule of an equal division of damages has disappeared entirely from these Scandinavian countries, although it was a feature of their early laws in respect of collisions occasioned by *chance*. For instance, the Code of Christian V, published in 1756 for the use of English inhabitants of Danish settlements, provided for the apportionment of loss in such cases as it appeared by the oaths of the master and crew of the colliding vessel that *the collision could not be avoided*.

In Italy also when the collision has resulted purely from chance or through *force majeure*, the resultant damages must be borne by the vessel upon whom they have fallen.

Codice di Commercio, Lib. II. Tit. VIII. Art. 660.

If the collision has been caused by the fault of one of the vessels all losses and damages are charged upon her. *(Art. 661).*

If, however, there is doubt as to which of two vessels the fault is imputable, or if there is a common fault, each carries the damages and losses which she has sustained, without right of reclamation, but each is held to make reparation *in solido* for all damages and losses to cargo or to persons on board *(Art. 662).*

There are no provisions in Italy now for the division of damages.

Spain has provisions almost identical with those of Italy.

Codigo de Commercio, Liv. III. Tit. IV. Sec. Art. 827.

So too has Germany.

Commercial Code of Germany Art. 737.

Holland, in cases of common fault, specifically charges

upon each vessel its own damage. She applies the same rule to collisions occurring through accidents ; but in cases where the fault is inscrutable she masses the damages of the two vessels, retaining so far the old practice of the maritime law, and apportions the aggregate *in proportion to the respective values* of the vessels.

Wetboek van Koophandel Nederlandsche Arts. 535, 536, 538.

Portugal's laws are similar to those of Holland, she retaining the principle of apportionment only in cases of inscrutable or doubtful cases (Havendo duvida sobre a causa da abalroaçã), and then making the apportionment in proportion to the value of the respective vessels.

Codigo Commercial Portuguez, Parte II., Liv. 1, Tit. 9, Sec. IV., Art. 1570.

Thus it is seen that the *judicium rusticum* has almost disappeared from the continent of Europe, being retained in France and Belgium, and to some extent in Holland and Portugal, but only in its old function for the adjustment of losses *when the fault is inscrutable.*

It is in that single class of cases, the cases due to inscrutable fault, in which the *judicium rusticum* may be commended as equitable. Undoubtedly such cases were far more numerous in the seventeenth and eighteenth centuries and in the early part of the nineteenth century than they are now. The rules of navigation were local, and lacked the precision and harmony and publicity of the International Statutes and the rules of this day. The facilities for discovering the truth and perpetuating proofs were crude.

The sailing craft responded less readily to the wishes of their navigators than do the great vessels which are controlled by powerful machinery and by steam.

The navigators themselves did not have the advantages of information which the close communication of the present day affords.

In those days the cases of inscrutable fault were not uncommon and the *judicium rusticum* afforded easy and equitable relief.

The rules of Oleron, the laws of Wisby, the Sea Laws, all of which admitted the *judicium rusticum*, applied it only in cases where there was *no* fault on either side, or where the fault was inscrutable.

The counsel for the *Victory* is in error on page 36 of his brief in citing these rules and laws as applicable to a collision brought about by the joint fault of both vessels. He will not find it so applied until the early part of the nineteenth century, and then *only in England*.

An equal division of damages in cases where both vessels have been found in fault has never been a part of the maritime law.

The courts of the present day have facilities for procuring and preserving testimony which were unknown even fifty years ago. They have, moreover, through the voluminous reports of adjudicated cases, means of keeping themselves in touch with all tribunals of the civilized world. They are able through the accurate transcript of proofs, and through the diffusion of adjudications and through the perfection of the rules of navigation, to measure with a precision unattainable heretofore the respective faults of two colliding vessels.

This being so, equity, which is the controlling principle of admiralty, calls upon the courts to so distribute the damages resulting from such a collision as to throw upon each vessel an adequate share of the burden. The rule of equal apportionment "has been stigmatized by at least one eminent "judge as inconsistent with natural justice."

Law Quarterly Review of London, Vol. 2, pp. 351, 362.

The rule by which the trial judge weighs and measures the faults of two colliding vessels and imposes upon them a proportionate amount of the resultant damages, is applied either by force of unwritten law or by force of statute in many of the continental courts, and the International Law Association at its seventeenth conference held in Brussels in October, 1895, discussed the question of its wider application. The members of the Conference are eminent jurists of all countries, the Chambers of Commerce of the important cities of the continent and Great Britain, the principal associations of ship-

owners, steamship companies, insurance companies, associations of adjusters and individuals.

Mr. Gray Hill of Liverpool, who stated that he was authorized to represent the Chamber of Shipping of the United Kingdom, the Liverpool and London Steamship Protection Association, the West of England Steamship Owners Protection and Indemnity Association, and the American Chamber of Commerce of Liverpool, introduced the following resolutions :

"That in the opinion of this Association the law which "enables the court to apportion the total of the damage done "to ships in collision, when both are in fault, in proportion to "the gravity of the faults committed by them respectively, is "preferable

"(1) to the law which leaves each ship to bear its own "damage ;

"(2) to the law which divides the total damage according "to the value of the ships respectively ; and

"(3) to that which divides it equally.

"That in the opinion of this Association, the first men- "tioned law should be adopted by all nations."

Report of Seventeenth Conference International Law Association, October 1895, p. 220.

Mr. Hill's resolution was seconded by Mr. Miller of London, and was supported by Mr. Clunet of Paris and by Mr. Langlois of Antwerp, who stated that such system was already established in their respective countries, and was in every way satisfactory.

After full discussion, the resolutions were adopted by a vote of eighteen to two.

Report of Seventeeth International Law Association, October, 1895, p. 226.

The courts of the United States are awaiting the decision of this Court to authorize them to proceed in the future to adjust the equities in collision cases by an apportionment of damages upon the offending vessels in proportion to their respective faults.

Fifth.

THE WRITS OF CERTIORARI SHOULD BE DISMISSED, AND THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE AEFIRMED WITH INTEREST AND COSTS.

BUTLER, NOTMAM, JOLINE & MYNDERSE,
Proctors for the Plymothian's cargo.

WILHELMUS MYNDERSE,
Advocate.

No. 67.

Brief of Hughes for McKeey.

FILED.
OCT 1 1895
JAMES H. McKENNEY

Filed Oct. 1, 1895.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. ~~375~~ 67.

JOHN MacINTYRE, JR., ET AL.

vs.

THE CANTON INSURANCE COMPANY, LIMITED, ET AL. AND CLAIMANT OF STEAMSHIP "PLYMOTHIAN."

ON PETITION OF JOHN MacINTYRE, JR., ET AL. FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION AND BRIEF.

ROBERT M. HUGHES, *Proctor.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

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PETITION AND BRIEF.

ROBERT M. HUGHES, *Proctor.*

To the Honorable Supreme Court of the United States:

The petition of John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann

Blenkinsop, Michael J. Wilkinson, Susan Weeks, Richard Leitch, and the British Steamship Investment Trust, Limited, respectfully shows to this honorable Court as follows:

The petitioners are owners of the British steamship *Victory*, which on her way into Norfolk about 4.15 p. m. November 12, 1891, collided with the British steamship *Plymothian*. The *Victory* was coming in light on a flood tide. The *Plymothian* had just finished coaling at Lambert's point and was starting to sea. The collision occurred near buoy No. 7, between Craney Island light-house and Lambert's Point pier. The vessels came together with the bow of the *Victory* against the port side of the *Plymothian*. The result was that the *Plymothian* sank and that a large hole was made in the starboard bow of the *Victory*, entering at the starboard side and almost going through the port side, causing the plates on the port side to bulge outwards, but, the *Victory* being light, the injury was above the water line. The *Plymothian* was loaded with cotton, which was damaged by water. The *Victory* was damaged to the extent of over $14,000 and the *Plymothian* to the extent of over $41,000, the cargo of the *Plymothian* being damaged about $72,000.

The petitioners promptly libeled the *Plymothian* and the owners of the cargo of the *Plymothian* libeled both the *Victory* and *Plymothian*. These libels, however, were merged into the limited liability proceeding that each vessel took immediately thereafter.

The claim of the *Victory* as to the facts of the collision is that she weighed anchor in Hampton Roads at 3.30 and started to Norfolk; that she met several steamers which gave her two whistles, which she accepted, thus placing her on the eastern side of the channel; that south of Craney island there were three schooners going down the river, forcing her to remain on the eastern side (as crossing to the other side would have involved crossing their bows and unnecessary danger); that the eastern side was clear and that

she came up, having reduced her speed just before reaching Craney island; that just after passing Craney Island light-house she saw a steamer on the western side of the river near the Merrimac buoy; that at this time the vessel was three or four points on her starboard bow; that she gave this steamer two whistles, the vessels being then some distance apart; that the steamer answered so that the master of the *Victory* saw two puffs of steam, but only managed to hear one whistle on account of its imperfections; that, to make things more certain, the *Victory* repeated her signal of two whistles, but the other vessel commenced to show by her movement that instead of keeping down the western side of the channel she was porting, thus crossing to the eastern side of the channel and throwing herself across the bows of the *Victory;* that as soon as those on board of the *Victory* observed this porting they reversed and gave danger signals; that they were not able to port themselves on account of a schooner which was on the *Victory's* starboard bow, and which would have been run over; that the other vessel continued to come ahead; that at the time of the collision the *Victory* had about killed her headway in the water (though it is possible that with a flood tide she had not killed her way over the ground); that the *Plymothian* ran across the *Victory's* bows, driving a piece of her plates through from starboard to port, and that the nature of the injury to the *Plymothian* was such that she was beached and sunk.

The contention of the *Plymothian* is exactly the opposite. They insist that they came out from the pier at Lambert's point and hugged the eastern line of the channel. They insist that they gave the first whistles, being a single signal repeated twice, and that the *Victory* crossed the signal by giving two whistles. They insist the *Victory* was not on the eastern side of the river coming in. They insist that she was proceeding too rapidly, and that she did not back until just before the collision, and they also insist that

they did back, and had some sternway at the time of the collision.

The district court decided that the *Victory* was solely to blame for the collision. It based its opinion upon the position that the International Rules of 1885, and not the rules of navigation laid down in section 4233 of the Revised Statutes and the supervising inspector's regulations, governed in the waters where the collision took place; that the *Victory* violated article 21 of the International Rules, requiring steamers in narrow channels to keep on the starboard side (a rule not found in the Revised Statutes or the supervising inspector's regulations), and that this was the proximate cause of the collision.

The court, in reaching this decision, expressly held that the port-helm rule (No. 15 International, No. 16 Federal) did not apply, as the vessels were not meeting in such direction as to involve risk of collision, nor did it blame the *Victory* on the score of signals or speed.

It found no fault with the *Plymothian* at all, although even according to the evidence of the *Plymothian* it had given its first signal to the *Victory* when they were a mile and an eighth apart, and did not reverse until, according to their testimony, the *Victory* had crossed signals with them and gotten within two or three hundred yards (Mardon, R., 265), and although the photographs show that at the time of collision the *Plymothian* was moving faster than the *Victory*. Nor did it find fault with the *Plymothian* for her imperfect lookout, although their own testimony showed that her navigators did not hear the first signal of the *Victory*, and did not see a schooner that was in front of them in plain sight.

From this decision the owners of the *Victory* appealed to the circuit court of appeals at Richmond, and the owners of the cargo of the *Plymothian* also appealed, because the *Victory* alone was held in fault and they were deprived thereby of all remedy against the *Plymothian*.

The circuit court of appeals held that the *Victory* was in fault for not taking the western side of the channel; held also that the International Rules governed these waters, and that she therefore violated article 21 of these rules; and went still further, and held the remarkable proposition that the Federal rules embodied in section 4233 contained a similar rule requiring vessels to keep to the starboard side of the channel or, as the court expresses it, to keep to the right. It does not cite this supposed rule from section 4233, but the petitioners presume that it has confused the port-helm rule with article 21 of the International Rules and held them synonymous, though no greater mistake could possibly be made, the district court having rightly held that the port-helm rule did not apply, as the vessels were not moving in such direction as to involve risk of collision. The circuit court of appeals, however, reversed the decision of the lower court as to the *Plymothian*, and held that the *Plymothian* was also in fault. The context of the opinion would rather indicate that the fault which they ascribe to the *Plymothian* was her failure to back in time. They speak of this as a very venial fault, "an act of omission," and they characterize the action of the *Victory* in not keeping on the starboard side by some very emphatic adjectives.

Accordingly they held both were in fault, but thought the fault of the *Victory* the greater, and they required the *Victory* to pay her entire bond, amounting to $67,500, and the *Plymothian* to simply make up the deficiency to the cargo-owners, a deficiency which, including interest, aggregated about $20,000, and they laid down the novel doctrine that a court in its discretion has power, if it thinks one vessel more in fault than another, to divide the damages between them unequally, and not to follow the rule of half damages, which they admit to be almost universal.

The petitioners appeal to this Court to review that decision, as it contains two questions, not simply of national, but

of international importance, namely, what waters are controlled by the International Rules, and what is the proper rule for dividing the damages where both vessels are in fault, even though the fault of one may exceed that of the other.

Many questions were discussed during the progress of this long litigation which have lost their importance, in view of the ground taken by the district court and the court of appeals in their opinions. As they are mainly questions of fact, it would serve no useful purpose to go into them elaborately, and therefore they will be reviewed as briefly as possible for the mere purpose of placing the Court in possession of the history of this litigation.

The first of these questions was whether, assuming for the moment the truth of the facts as claimed by the *Victory*, she was right in starboarding her helm.

DID THE PORT-HELM RULE APPLY?

According to our contention, when the *Plymothian* came out from Lambert's pier and swung around into the channel, the tide being flood and therefore sweeping her up the river, she necessarily went over, not of course to the western edge, but into the western half of the channel—that is, west of mid-channel—and in this position was three or four points on the *Victory's* starboard bow, at which time the *Victory* gave her two signals. It was contended in the lower court that even on this state of facts, if true, they were meeting end on, and the *Victory* should have given her one whistle and applied the port-helm rule.

That rule is in the following language:

"If two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass to the port side of the other."

This rule has been frequently before the courts, and the conclusion has been that vessels are not meeting end on unless they are in such position that, if at night, each would see both colored lights of the other. As long as they are moving on courses which, if at night, would expose green to green or red to red, it is not a case where the rule applies.

This understanding of the law is universal among courts and seamen, and is well expressed in the old couplet:

"Green to green, or red to red,
Perfect safety, go ahead."

When vessels are moving on courses so they will clear each other if each holds its course, the law does not require them to swing around and each cross the other's path for the mere sake of a port helm.

Marsden, in his admirable work on collisions, says that the indiscriminate application of the port-helm rule has been a fruitful source of collision (p. 422).

When vessels are meeting each other dead ahead or slightly on each other's port bow, then the rule undoubtedly is that each must port; but when each is on the other's starboard bow as much as a point or more, then, as there is no risk of collision while that position is maintained, the rules of the road not only justify, but require that they shall pass each other starboard to starboard.

This is carried out in the navigation of our local waters by rule 1 of the Pilot Rules for Lakes and Seaboard, prescribed by the supervising inspectors.

That rule is in the following language:

"When steamers are approaching each other head and head, or nearly so, it shall be the duty of each steamer to pass to the right or port side of the other, and the pilot of either steamer may be first in determining to pursue this course, and thereupon shall give, as a signal of his intention, one short and distinct blast of his steam whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his whistle, and thereupon such steamers shall

pass to the right, or port side, of each other. But if the course of such steamers is so far on the starboard of each other as not to be considered by pilots as meeting head and head, or nearly so, the pilot so first deciding shall immediately give two short and distinct blasts of his steam whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam whistle, and they shall pass to the left or starboard side of each other.

"NOTE.—In the night steamers will be considered as meeting head and head so long as both the colored lights of each are in view of the other."

In the case of the *Manitoba* (2 Flip., 241), Brown, district judge, held that this port-helm rule only applied when, if it was a case at night, each vessel would see both of the lights of the other. It was a case where the divergence was only three-fourths of a point, each being that much on the other's starboard bow, and the court held that starboarding was the proper course. This decision was affirmed both by the circuit court and by the Supreme Court.

The Manitoba, 122 U. S., 97.

The testimony of the crew of the *Victory* that they were forced to the eastern side by passing vessels was much attacked, and witnesses from two or three steamers that went down that evening were produced by the *Plymothian* to show that they had passed the *Victory* port to port. It is not a sufficient impeachment of a witness to show that in a harbor of the importance of Norfolk some steamers passed differently from his contention. The fact that the *Luray* and *Virginia Dare* passed port to port does not show that the *Louise* and *Accomac*, which were the steamers named by the *Victory's* witnesses, did not pass port to port.

DID THE VICTORY BACK SEASONABLY?

The *Victory* was also attacked on the ground that she did not stop and reverse in season. The proof on the side of the *Victory* as to this is that she gave a single signal;

that she saw a response, but could not make it out on account of its indistinctness; that she thereupon repeated her signal, and that she reversed as soon as she saw indications in the opposing vessel of swinging across her path.

The language of the backing rule is as follows:

"Every steam vessel when approaching another vessel so as to involve risk of collision shall slacken her speed or, if necessary, stop and reverse."

According to the testimony of the *Victory*, confirmed by some of the witnesses for the *Plymothian*, she had already slowed down. She did not, therefore, have to stop and reverse, under the very letter of the rule, until it was necessary, and it was not necessary until this eccentric movement of the *Plymothian* was developed. At that time it was too late, as far as the *Victory* was concerned, for she was coming in with a flood tide of two knots, and therefore took a much longer time to kill her headway than the *Plymothian*, which had just started and had the tide against her. This fact made the *Victory* the favored vessel.

The Galatea, 92 U. S., 439.
The Diana (1894), A. C., 629.

WHISTLES.

The question of whistles was the one most vigorously contested in the lower court, and as to which the evidence is hopelessly in conflict.

The contention of the *Victory* is that she gave the first signal of two whistles, and that the *Plymothian* crossed her signal. The contention of the *Plymothian* is that she gave the first signal of one whistle, and that the *Victory* crossed her signal.

The contention of the *Victory* was confirmed by disinterested testimony from the steamer *Princess*, which was anchored near the collision spot, that testimony being taken

only two days after the collision, and by disinterested testimony from the barge *Storm King*, which was taken about a year after the collision. On the other hand, a very great number of witnesses were produced by the *Plymothian* at the trial three years afterwards to show that she gave the first signals. Their testimony, however, is as much in conflict with the crew of the *Plymothian* as it is with the crew of the *Victory*. The *Plymothian* claims to have given her first signal when she was about off buoy 9, at Lambert's point, and the *Victory* about off Craney Island light. At this time the vessels were a mile and an eighth apart, and the testimony of both sides is to the effect that the whistles of English steamers are inferior. The usual signaling distance, as is well known, is about a half a mile, so that it would not be an unpardonable crime if the navigators of the *Victory* did not hear this first signal.

The navigators of the *Plymothian* claim that they gave one signal, then another, then another, and finally the danger signal, and that the *Victory* answered only their third signal. The testimony of their disinterested witnesses is that they only gave two single signals to the *Victory*, and that the *Victory* answered the first, and the testimony of the navigators to the effect that they gave three single signals is contradicted by some of their own crew. Lyons, their helmsman, only heard two; Ham, one of the crew, only heard two, and Shroeder, another of their crew, only heard two. In addition, the proof shows that many salute whistles were given, that there were many tugs blowing around Lambert's point, and it was a venial fault in the crew of the *Victory* not to have heard all these whistles, which disinterested witnesses immediately around the *Plymothian* and not a mile and an eighth distant, like the *Victory*, positively swear were not given.

Neither the district nor appellate court, however, found any fault with the *Victory* on the score of her whistles.

COMPARATIVE SPEED.

Another question much discussed in the lower court was the speed of the two vessels. The witnesses for the *Plymothian* did not hesitate to make the wildest statements as to the speed of the *Victory*, some of them putting it as high as ten or twelve miles an hour.

Careful measurements will show that from Craney island to buoy 7 the distance is 1,150 yards, and from buoy 9 to buoy 7 is 750 yards. The district court in its opinion states that from Craney island up to buoy 7 is 1,200 yards, and to buoy 9 is 1,967 yards, and that the distance between the two buoys is 735 yards. This is a patent mistake, for if it is 1,967 yards from Craney island to buoy 9 and 1,200 from Craney island to buoy 7 it is bound to be 767 from buoy 7 to buoy 9. In the rough, then, we may say that the distance from buoy 7 to Craney island is one and one-half times that from buoy 9 to buoy 7. The testimony of the *Plymothian* navigators places the *Victory* off Craney island and themselves off buoy 9 when the first signals were exchanged; hence, according to their own testimony, the *Victory* moved 1,200 yards while they moved, say, 800 yards—that is, she was moving one and one-half times as fast only; but the *Victory* had behind her a current of two miles an hour, and the *Plymothian* had against her a current of the same amount. Disregarding the current entirely, if the *Plymothian* was moving at the rate of four and a half miles an hour the *Victory* was only moving at the rate of seven miles an hour, and when we take the current into account the *Plymothian* appears to have been moving through the water faster than the *Victory*.

THE VICTORY'S COURSE.

The question of the *Victory's* course was also much discussed in the lower court. The pleadings of the *Plymothian* themselves only claim that the *Victory* was in mid-channel, so that the testimony of some of their witnesses, that she was west of mid-channel, is as preposterous as their statements of her speed.

THE PLYMOTHIAN'S COURSE.

The question as to the *Plymothian's* course was also much confused. She claims that she went out from Lambert's pier, turned sharp around buoy 9, passing it within a few yards only, and kept straight down the edge of the eastern side of the channel, moving under a port helm all the time. The *Victory* claims that in coming out from the pier into the channel she necessarily went out partially across the channel. As she was 260 feet long and the tide was flood—that is, on her starboard bow—common sense would seem to sustain this claim. If a ship 260 feet long can turn sharp around a buoy as a buggy turns sharp around a street corner, she must have a fifth wheel in her like a buggy. Such vessels have not as yet been invented. Some of their own witnesses place her much further out than the eastern edge of the channel, which her navigators claim she always held. For instance, J. I. Clark, disinterested, testifies that she went out "not quite to mid-channel" (R., 389). Brown from Craney Island light saw her "about the middle of the channel" (R., 346). Ham, one of her own crew, says that in going out they headed straight across the river (R., 189). Lyons, another, speaks of receiving a certain order "when we got out in the middle a way" (R., 209). Her testimony that she hugged the eastern bank is necessarily impossible. According to these measurements, it is about 800

yards from buoy 9 to buoy 7. They claim that after they passed buoy 9 their helm was slightly a-port until shortly before the collision, when it was put hard-a-port. How did she move within 40 to 60 yards of the bank a distance of 800 yards without running aground?

These questions, however, are immaterial in view of the opinions, though the petitioners feel bound to allude to them, as they can concede nothing by silence. The important questions in the case are those which were emphasized in the opinion of the courts, namely, whether the International Rules govern the navigation of these waters, and thereby made the *Victory* so emphatically in fault as the appellate court seems to think, and whether, even if she was guilty of greater fault than the *Plymothian*, the court had any power to divide the damages according to mere caprice and not follow the rule of half damages.

The importance of the question whether these waters are controlled by the International Rules of 1885, instead of the Federal statutes and Supervising Inspector's Rules, arises from the fact that the International Rules of 1885 contain an article (No. 21) in the following language:

"In narrow channels every steamship shall, when it is safe and practicable, keep to the side of the fairway or mid-channel which lies on the starboard side of such ship."

This rule, despite the assertion of the court of appeals, has no counterpart in section 4233 or the Supervising Inspector's Rules, and yet the violation of this rule is the main fault which the court has found against the *Victory*. If, therefore, the International Rules do not apply to these waters, but the Supervising Inspector's Rules, the action of the *Victory* in the collision in taking the eastern side is vindicated, for, as is well stated in the last edition of *Marsden on Collision, page 465*—

"Questions may arise as to the application of the starboard-side rule or article 21 in waters where (as, for example, the River Thames) local rules of navigation are in force; but where there is no rule as to the side of the channel upon which ships are to navigate, it is submitted that in such case article 21 has no application, and that absence in the local rules of a rule requiring vessels to navigate on one side of the channel or the other leads to the inference that vessels are free to navigate in any part of the channel."

Hence, if those waters are governed by the Federal statutes and the Supervising Inspector's Rules, all parts of that channel were free to the *Victory*.

DO THE INTERNATIONAL OR FEDERAL RULES APPLY?

In deciding whether the rules of 1885 apply in certain waters of the United States we must look, not to the language of the rules themselves, but to the language of the enacting clause of the statute adopting them. The fact that they have rules for narrow channels or even for harbors is no indication that Congress intended them to apply unless the enacting clause shows such to have been the intention. They must have such rules, for they apply in the harbors of barbarous countries which have no rules of their own; they apply in the narrow channels of archipelagoes, which are not local waters; they apply in straits not under the dominion of any one power, and hence the fact that such rules are contained in the International Rules is no proof that Congress intended them to apply unless Congress has shown its intention that they should. The enacting clause will show that Congress expressly excluded them from applying in local waters, for it says that they shall apply "upon the high seas and in all coast waters of the United States except such as are otherwise provided for." This means except such other waters as are otherwise provided for. The waters otherwise provided for are made

sufficiently plain by the repealing clause of the statute, which says:

"All inconsistent laws are hereby repealed except as to the navigation of such vessels within the harbors, lakes, and inland waters of the United States."

Therefore the harbors, lakes, and inland waters of the United States are otherwise provided for, namely, by section 4233 of the Revised Statutes and by the Supervising Inspector's Rules, and therefore the International Rules do not apply upon them.

Yet in the face of this language, so clear that he who runs may read, the district court held (R., 453) that all tide waters navigable from the ocean with navigable depth for ocean craft are coast waters in the meaning of article 21.

It ought not to be hard to find out what is meant by coast waters. Burrill's Law Dictionary defines the coast as "the edge or margin of land next to the sea, the seashore," and the *Garden City case, 26 F. R., 775*, much relied upon by our opponents, defines coast waters as embracing "not merely waters that face the open sea, but bays, passages, inlets, and sounds formed by the islands that skirt the coast." It will require a remarkable geographer to bring the Elizabeth river within this definition. How a body of water thirty miles from the ocean, divided therefrom by a body of land twenty miles square out of sight of the ocean and connecting with it by a narrow channel commanded even by the antiquated guns of Fort Monroe, can be called coast waters passes the comprehension. Not only that, but the locality of this collision was really in a harbor.

Section 2010 of the Code of Virginia, as amended by Acts of Assembly, 1889–'90 (private), p. 623, taken from the chapter of the code establishing a board of harbor commissioners for Norfolk, Portsmouth, and Norfolk county, provides—

"The jurisdiction of said board for the purposes of this chapter shall extend to the Elizabeth river and all branches

and tributaries thereof along the water front of the cities of Norfolk and Portsmouth and Norfolk county."

In the *New York-Lawrence Collision case, 54 F. R., 542,* the right of a harbor master to anchor vessels along this spot was sustained first by the district court (decision unreported) and then by the circuit court of appeals; and yet waters within the jurisdiction of a harbor master are not harbors! A harbor is a place where vessels are accustomed to resort and moor, a safe station for ships, a place of refuge, shelter, rest, and the proof in this case is that many vessels were anchored along in this vicinity waiting their turn at a coal pier, and yet that is not a harbor!

The district judge seemed to think that some terrible consequences to commerce might happen if a vessel starting on a foreign voyage had to change from the International Rules to the Federal Rules and refuses "to dwarf the river into a local harbor subject to the provincial domination of a town council and the crude regulations of ever-changing town officials." The place of this collision was not within the harbor limits of the city of Norfolk, was not subject to the regulations of any town officials or town councils, but was under the jurisdiction of the board of harbor commissioners, a State board created for the purpose of protecting the harbor and prescribing rules for its governance. The "town council" which enacted the Federal Rules was Congress, a body designated by the judge in a late silver article as itself an international board.

This court has frequently sustained even State laws applying to local waters like harbor commissioners' rules, quarantine rules, and pilot rules, and the district court itself has found vessels in fault in this very harbor for violating rules of this very board as to speed, and for twenty years has been applying in the navigation of these waters section 4233 and the Supervising Inspector's Rules.

Nor is there anything in the contention that foreign ves-

sels are subjected to inconvenience in changing from International to Federal Rules on reaching the waters of the United States. There is not a port of any size in any enlightened country which has not special rules for its navigation. The most important are collected in the appendix of Marsden on Collision. The Rivers Thames, Mersey, Scheldt, Clyde, and many others have them. Apparently this fact has not dwarfed the growth of London, Liverpool, or Glasgow as compared to Norfolk. When vessels come into local waters they are supposed to take local pilots. The vessels in this case were both in charge of local pilots who are presumed to know the Federal Rules; hence there is no hardship in bringing them under the purview of these rules.

As was well said by Chief Justice Waite in the *Sarmatian*, *5 Hughes, 158–'9:*

"It is next insisted that as the *Sarmatian* was a British vessel, and by the laws of Great Britain sailing vessels are not required to show torch-lights, the schooner can recover, notwithstanding she exhibited hers so late. The two vessels were on American waters and not on the high seas; they were in the Chesapeake bay, and *infra fauces terræ*. A vast majority of the commerce carried on there was coastwise and local. The *Sarmatian* was subject to the operation of pilot law and within the limits of pilot service. If she had attempted to proceed without a pilot, after one could have been had, she would have been guilty of a breach of duty and liable to her shippers and insurers for any loss on that account. While the rules of navigation adopted by Congress are only intended for the government of vessels of the navy and mercantile marine of the United States, no vessel forming part of that marine can excuse herself from following their requirements while in the waters of the United States and on pilot ground simply because the vessel it meets is sailing under a foreign flag. Pilots are employed, not only to keep a vessel on her proper course, but to enable her to understand the local usages governing the navigation of the waters in which she is sailing. As the law requires a foreign vessel to have a pilot on board, it is to be

presumed he will be at his post and govern himself by the rules prescribed by the proper authorities regulating navigation in that locality. Under such circumstances every pilot has the right to believe that all vessels he meets will do what the local laws or usages require of them and act accordingly."

The fact that the International Rules of 1885 are not intended to apply is shown by their very language. Those rules, for instance, although they prescribe a full set of lights for sea-going vessels, prescribe none for river steamers. It is the Federal statutes and the Supervising Inspector's Rules which prescribe lights for river steamers. Those lights for such steamers are not only the colored lights, but the two range lights, consisting of a bright light on the stem and a bright light on the flagstaff aft, whereas the International Rules prescribe only the lights carried by sea-going vessels, namely, the two colored lights and the bright masthead light. Hence, if the International Rules governed and not the Federal Rules and Supervising Inspector's Regulations, every river steamer that runs out of this harbor is improperly rigged and has been for years, and this very district court in the case of the *Conoho, 24 F. R., 758*, held a steamer in fault for not being rigged with these range lights.

It is settled law that the soil of these waters and of Chesapeake bay belong to the State and their shell-fish and oysters to the citizens of the State, and yet we are told that they are coast waters!

In the *Cotton Plant, 10 Wall., 577*, this Court held that the waters of the Roanoke river above Plymouth were included in the term "inland waters," and repudiated the idea on which the district court based its decision that they were coast waters because they were navigable from the ocean.

The circuit court of appeals in its decision (also holding that the International Rules governed) first cites as authority the *Britannia case, 153 U. S., 130*, and says this Court held

this rule 21 binding upon vessels in the harbor of New York. The most casual examination of this case shows that this Court held nothing of the sort; that the rules of 1885 were not once alluded to in the opinion, and that the quotations were entirely from the rules contained in section 4233. The court is equally unfortunate in its reference to what it terms the *John Knox case*, *1 C. C. A.*, p. 323, where it says that the circuit court of appeals for the second circuit reached the same conclusion. The reference is meant for the *John King case*, and the circuit court of appeals for the second circuit reached no such conclusion. The International Rules were not once alluded to, and section 4233 was the only one which was quoted from.

And in the *Lisbonense*, *53 F. R.*, *297*, this same circuit court of appeals for the second circuit, which is represented as applying the International Rules, calls attention to the fact that the International Rules apply below the Narrows and the Federal Rules above the Narrows of New York harbor, and calls attention to various differences between them.

As for the position of this Court on the subject, it not only did not apply the International Rules in the *Britannia case*, but in the subsequent case of the *Breakwater*, *155 U. S.*, *252*, it applied section 4233 and not the International Rules, and in the very recent case of the *Oregon*, *158 U. S.*, *at p. 204–'5*, it intimates (without positively deciding) that the International Rules did not apply in waters such as those; so that no utterance of this Court or of the circuit court of appeals for the second circuit sustains the position of the court on this point.

After thus misquoting these two courts the circuit court of appeals goes on to hold that this phrase in the repealing clause, excepting harbors, lakes, and inland waters, meant the Great Lakes and their harbors and inland waters connected therewith and the inland waters at long distances from the sea. If this was the construction the word "lakes"

alone would have accomplished the purpose, and it is hard to see why the words "harbors" and "inland waters" were inserted.

It would be impossible to apply this starboard-hand rule in harbors. To require vessels going into harbors and approaching vessels at anchor to keep an unswerving course to the right is to ensure collision. Hence, the *Victory* was not at fault in the matter which has been made by both courts the pivotal charge against her.

This brings us to the discussion of the faults of the *Plymothian*. If the testimony of the *Victory* is to be believed as against her testimony, then she was the one that crossed signals and she was much the greater in fault; but for the purposes of this discussion on the question of damages we will take her own testimony, and by that two acts of negligence are clearly proved against her.

THE PLYMOTHIAN'S IMPERFECT LOOKOUT.

In the first place, her own testimony shows that she was not keeping a proper lookout. According to that testimony, her navigators did not hear the signals of the *Victory*, which her disinterested witnesses testified were given, and did not see a schooner until after the collision, which the overwhelming preponderance of testimony proved to be there. They confess to not seeing a schooner which many others saw, to not hearing what many other disinterested witnesses all around them heard, and therefore they were at fault.

The district court held that, though their lookout was imperfect, it did not contribute to the collision. It bases this on the ground that the *Victory* had no right to order the *Plymothian* to take a different course, and that therefore the *Plymothian* had no right to change her course, and that therefore, even if they had heard this first signal of the *Vic-*

tory, they would not have been justified in changing their course, and therefore their inattention was immaterial.

This position, put in plain English, is about equivalent to holding that if one vessel is in fault the other vessel not only has the right, but is in duty bound, to run her down.

It assumes that the only thing which the *Plymothian* could or should have done, in case her lookout had been more attentive, was to change her course, but this view of the district court ignores entirely the very important consideration that if she heard this first cross-signal she could have stopped and backed more promptly.

And this brings us to the other and still more serious charge against the *Plymothian*, to wit, her failure to reverse until too late.

THE PLYMOTHIAN'S TARDY REVERSING.

The crew of the *Plymothian* contend in this case that their engines had been reversed for four minutes at the time of the collision.

If they had given this statement as a mere matter of judgment we might excuse them on the ground of the well-known unreliability of such estimates, but they have laid themselves open to a more serious charge.

We charge that in order to make a case on this point they have deliberately doctored their engineer's log.

The testimony shows that this log, as is the practice, was written up on the evening of that date—that is, after the collision had occurred. It was the more incumbent upon them to write it up naturally and truthfully, but their writing up of what happened in the morning and what happened in the afternoon is on two entirely different theories. Their witnesses testify that it is usual when orders come fast together, so that all cannot be taken down, to simply say in their log "engines working to order." Accordingly we find in this log that in coming into the harbor that

morning they simply say "worked engines to order into coaling berth." On the other hand, in going out they say: "Stand by to order 4 p. m.; full speed 4.05 p. m.; full speed astern 4.10 p. m.;" ship struck 4.14 p. m.; full speed ahead 4.15 p. m., and yet their own witnesses admit that their log does not show all the orders that were given (R., 168–'9). This at once shows that their log was fabricated. If they attempted to write anything they ought to have written everything. It is unreasonable to suppose that at a moment like that, when, as one of their witnesses says, there was danger that the men in the engine-room might be killed, they should stop to note the exact time, and yet only noted the exact time of two or three things.

It is incredible for another reason. According to this testimony, the engines of the *Plymothian* were moving backwards four minutes before the collision, and yet their pleadings only claim that at the time of the collision the headway of the *Plymothian* was entirely checked, and the *Victory's* injuries show that she was moving ahead. She had a two-knot current against her, which would enable her to stop with much more ease, and yet they contend that, though they had barely gotten up steerage-way, according to some of their witnesses, having proceeded such a short distance that they had not gotten up full speed, and though they had the tide against them, they had reversed their engines for four minutes without being able to stop their ship. This, too, is absolutely preposterous. If they could not stop her in four minutes with the tide against her, then, indeed, she must have been proceeding at a rate compared to which the greyhounds of the Atlantic are nothing. This log is suspicious and incredible.

If anybody knows how quickly a steamer can be stopped, it ought to be her engineer.

Pearse, one of the engineers of the *Plymothian*, testifies (R., 182–'3):

"Q. You have stated that when that vessel is under way, full speed ahead, and orders for the engines to go full speed astern are given, that it takes some time to overcome the movement ahead before she moves backwards through the water, and you estimate that time at about a minute?

"A. *About one minute. One minute would be the outside.*"

* * * "Q. How soon will she go astern? Does that depend upon how much headway she has?

"A. Yes, sir; if she has full speed ahead it will take longer to go astern, but she will only take about a minute."

Independent of the testimony of her engineer, any one with any experience knows that it does not take four minutes to start a ship backwards in the water even from full speed. A boat that is as unwieldly as that should be condemned as a public nuisance.

Hence, this entry in the log of the *Plymothian* is false, and deliberately false. It is worse than a crime—it is a blunder. We have the right, therefore, to reject the testimony of the *Plymothian* entirely on the subject of her reversing. Moving as slowly as she was, with a head tide, she ought to have been stopped and could have been stopped, according to the testimony of her own engineer, in less than a minute, and therefore she could not have been reversed as long as four minutes. Hence, she did not reverse until just before the collision. She has a heavier burden in this respect than the *Victory*, because she had the tide to help her manœuvre and the *Victory* had the tide to oppose her.

The testimony of the *Plymothian's* crew, when they are not asked the direct question how many minutes they were reversing, shows that they reversed but a very short time before the collision. For instance, Schroder testifies that he first saw the *Victory* over his starboard bow (not his port); that the *Victory* was then "no ways off" (R., 205), and this was before any reversing at all.

Lyons says that he cannot tell how long they were reversed, but it was a little while. (R., 210.)

Wood is specially emphatic. It is to be remembered that according to the testimony of the navigators of the *Plymothian* the third whistle and the order to reverse were coincident, so that they claim that it was four minutes from the third whistle till the collision. Wood, however, says that the interval between the danger signal and collision was about the same as the interval between the other signals, which he had previously estimated at 20 to 30 seconds, and that at the time the two vessels were only 150 feet apart, so that Wood shows that the *Plymothian* did not reverse until 20 or 30 seconds before the collision and at a time when the vessels were only 150 feet apart.

And even Mardon, the master, who testifies that the danger signals, reversing, and hard-porting were coincident, says that at the time of his hard-porting the *Victory* was only from 200 to 300 yards off. He also says, contrary to the great mass of evidence, that at that time the *Victory* was coming up full speed. Hence, according to his own testimony, he did not reverse until he was within 300 yards of the collision, though his first signal had been given 1⅛ miles off and was unanswered.

The *Plymothian* certainly moved part of this 300 yards before the collision. He does not contend that when he reversed his engines she stopped in her tracks. But let us assume, for the sake of illustrating this point, that the *Plymothian*, the very second she reversed, immediately became still, or, in the language of his answer, that her headway was then entirely checked. If the *Victory* was moving at full speed at a point only 300 yards off, with a strong tide behind her, her full speed being 10 miles an hour, it would take her less than a minute to move 300 yards. If she was not at full speed, but moving at half speed or 5 knots an hour, it would take her less than two minutes to move 300 yards; hence, on Mardon's own statement, even assuming that the *Plymothian* moved not at all, his engines were reversed for less than two minutes before the collision, and yet

his log is brought into court with an entry purporting to have been made by the clock, which is a physical impossibility and a patent imposture.

The very photograph which was offered to show the injuries of the *Plymothian* proves that at the time she was going forward, for an inspection of it will show that its front edge is perfectly smooth, whereas its back edge is rolled and curled back. If she had been stationary the cut on the two sides would have been exactly similar; if she had been moving backward the front edge would show a roll. The fact that the back edge is rolled back shows that she had at least some motion across the bows of the *Victory*, and the further fact shown by our testimony and photographs that there was a hole in the starboard bow of the *Victory*, and a piece of iron had gone through that and lodged up against the other side, pressing it out, although the stem itself was not broken, shows this still more conclusively.

It is difficult to see why, in view of this act of the *Plymothian*, the circuit court of appeals should have considered the fault of the *Victory* the gravest and that of the *Plymothian* slight. The main fault found against the *Victory* was her taking the wrong side of the channel, and that this was not such a culpable one sufficiently appears by the opinion of the district judge, wherein he says:

"East of buoy 9 there is a wide space of water extending half a mile to land, but it has no navigable depth. It is deceptive, however, and, owing to the eastward bend of the channel around buoy 9 to Lambert's Point pier, navigators coming up from Craney island are apt to head directly for Lambert's Point light, thinking they are in mid-channel, when, in fact, they are more or less east of mid-channel, are unintentionally violating a cardinal rule of navigation, which enjoins them to keep on the spacious waters west of mid-channel." (R., 448–'9.)

The circuit court of appeals speaks of the negligence of the *Plymothian* as merely "an act of omission."

The line between acts of omission and commission is sometimes hard to draw and depends very much on the way you look at it. If a driver sees a child in a public road in ample time to stop and deliberately and wilfully runs over it, he is in one sense guilty only of an act of omission, but it is a novel doctrine to hold that on this account his fault is a slight one. But however this may be and however negligent the *Victory* may have been and however venial the negligence of the *Plymothian* may have been, the petitioners submit that the act of the circuit court of appeals in dividing the damages otherwise than equally is unsustained by authority and as dangerous as it is novel.

THE HALF-DAMAGE RULE.

The opinion cites but one authority to sustain its right to divide damages according to caprice, and that is the case of the *Max Morris, 137 U. S., 1.* The reference to this case is as inapposite as the reference to the *Britannia* and *John King* cases. There is not a line in the *Max Morris* case which holds or intimates that an admiralty court has any discretion as to dividing the damages in collision cases otherwise than equally where both are in fault. That was a personal-injury case, and the real question involved was whether, in case of a libel for personal injury, the collision rule of half damages applied or the common-law rule of contributory negligence allowing no damages. The court, in deciding that in such cases it could make a small award, expressly did so on the ground that it was not a collision case, and the opinion throughout assumes that in collision cases the rule is otherwise.

It is otherwise both in England and America. In the case of *The Catharine, 17 How., at p. 177,* this Court says:

"Upon this view of the case it becomes necessary to settle the rule of damages in a case where both vessels are in fault.

"The question, we believe, has never until now come distinctly before this Court for decision. The rule that prevails in the district and circuit courts, we understand, has been to divide the loss. (9 Law Rep., 30.)

"This seems now to be the well-settled rule in the English admiralty. (Petersfield *vs.* The Judith, Abbot on Sh., 231, 232; The Celt, 3 Hagg., 328, n.; The Washington, 5 Jurist, 1067; The Fiends, 4 E. F. Moore Rep., 314, 322; The Seringapatam, 5 Notes of Cases, 61, 66; Vaux *vs.* Salvador, 4 Ad. and Ell., 431; The Monarch, 1 Wm. Rob., 21; The De Cock, 5 Monthly Law Mag., 303; The Oratava, 5 *ib.*, 45, 362.)

"Under the circumstances usually attending these disasters we think the rule dividing the loss the most just and equitable and as best tending to induce care and vigilance on both sides in the navigation."

The English law is well expressed in the case of *Devaux vs. Salvador, 4 Ad. and Ell. (31 E. C. L.), 420*, where Lord Denman said:

"But the collision causes the ship insured to do some damage to the other vessel; and whenever this effect is produced, both vessels being in fault, a positive rule of the court of admiralty requires the damage done to both ships to be added together and the combined amount to be equally divided between the owners of the two."

See also *Abbot on Shipping, 330–'1.*

These decisions have been followed in numberless cases both in England and America. It is difficult to gather from them any support for the doctrine that damages can be divided otherwise than equally.

Novel as this doctrine is on authority, its dangers exceed its novelty. It is perilous to leave anything to discretion. The more definite the law, the more clearly the rights of parties are defined, the more intelligently can they be advised as to their rights, the more certainly can the result of

litigation be ascertained and the amount of litigation diminished. To allow any one of the nine circuit courts of appeal or the sixty district judges such latitude as to the proportions in which damages should be divided is to put the profession completely at sea. Certainty disappears and litigation increases. The caprice of the individual judge is substituted for the definite rules of precedent, and the remark of the old satirist that equity might as well be measured by the chancellor's foot as by the chancellor's conscience will obtain modern significance. Judicial legislation should never be encouraged, especially when it is undertaken by inferior courts.

It has been frequently said and is the modern trend of opinion that there are no degrees of negligence, and division into ordinary, gross and light has been characterized as merely the description of negligence with an epithet.

"I can see no difference between negligence and gross negligence. It is the same thing with the addition of a vituperative epithet."

Rolfe, B., in Wilson vs. Brett, 11 M. & W., at p. 116.

"It may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists."

Lord Denman in Hinton vs. Dibbin, 2 Q. B., 650.

"We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. * * * And this seems to be the tendency of modern authorities."

Mr. Justice Bradley in R. Co. vs. Lockwood, 17 Wall., at p. 382, followed in Briggs vs. Spalding, 141 U. S., at p. 151.

No yard-stick can be invented by which negligence can be measured. No court can attempt to apportion its exact degrees. Even the doctrine of comparative negligence hinted at by a few courts has not met with approbation.

It is an Illinois innovation, and a distinguished text-writer has stated that it will admit of question whether or not it has not created more confusion than anything else. (*2 Wood on Railroads, last ed., p. 1506, sec. 322b.*)

This decision of the circuit court of appeals, tending to divide negligence into degrees, is therefore a step in the direction of an exploded doctrine.

Your petitioners therefore submit that the decision of the lower courts in this case is erroneous:

1. In holding the *Victory* to blame at all.

2. In holding that she violated a rule which has no existence on the inland waters of the United States.

3. In holding that her act in so doing was gross negligence.

4. In holding that she should be made to pay more than half the damages.

5. In not holding the *Plymothian* solely to blame.

And they assign this action as error.

They respectfully submit that in view of the large amounts involved in this case, and of the two exceedingly important legal questions involved, namely, as to the application of the International Rules and as to the proper rule for dividing the damages, it is pre-eminently a case in which this Court should issue a certiorari promptly settling these questions.

Your petitioners herewith file a certified copy of the record in the said cause.

The attention of the Court is called to the fact that the mandate is only suspended until November 1, and the peti-

tioners therefore feel impelled to ask a prompt consideration of this petition by the Court.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under seal of this court, directed to the United States circuit court of appeals for the fourth circuit, commanding the said court to certify and send to this Court, on a certain day to be therein designated, a full and complete transcript of the record of all proceedings of the said circuit court of appeals in the said cause, to the end that said cause may be reviewed and determined by this Court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the provisions of said act, and that the said judgment of the said circuit court of appeals in the said cause may be reversed by this honorable Court in the particulars above mentioned.

And your petitioners will ever pray, etc.

PETITIONERS,
By ROB'T M. HUGHES,
Counsel.

STATE OF VIRGINIA, }
Corporation of the City of Norfolk, } *To wit:*

Personally appeared Robert M. Hughes, who, being duly sworn, on his oath says that he is counsel for John MacIntyre, Jr., and others, the petitioners above named, and as such had personal charge for them of the case in the foregoing petition mentioned in the district court of the United States for the eastern district of Virginia and in the United

States circuit court of appeals for the fourth circuit; that he has read the petition by him subscribed, and that the facts therein stated are true to the best of his knowledge and belief.

ROB'T M. HUGHES.

Sworn to before me and subscribed in my presence this 21st day of September, A. D. 1895.

[SEAL.] H. H. LITTLE,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

To The Port of Plymouth Steamship Company, Limited, and to The Canton Insurance Company, Limited; The Triton Insurance Company, Limited; The Indemnity Mutual Marine Insurance Company, Limited; The Atlantic Mutual Insurance Company, The London Assurance Corporation, The Copartnership of C. T. Bowring & Company, The Standard Marine Insurance Company, Limited; The British and Foreign Marine Insurance Company, Limited, and The President and Directors of the Insurance Company of North America:

Take notice that on Tuesday, October 1, 1895, we will file a petition in the Supreme Court of the United States to bring up on certiorari from the circuit court of appeals for the fourth circuit the record in the suit of The Canton Insurance Company, Limited, *et al. vs.* Claimants of Steamship *Victory* and Claimants of Steamship *Plymothian* and Claimants of Steamship *Victory vs.* The Canton Insurance Company, Limited, *et als.* and Claimants of Steamship *Plymothian* for the purpose of having the same reviewed and

reversed, and that on Monday, October 14, 1895, we will submit the said petition to the Court for action.

JOHN MACINTYRE, JR.,
THOMAS C. MACINTYRE,
JAMES ALLEN MACINTYRE,
CUTHBERT HUTCHINSON,
PETER ALLEN,
GEORGE Y. BLAIR,
WILLIAM H. GOULD,
JAMES BROTHERTON,
CAROLINE REA,
THOMAS W. SPENCER,
JOSEPH FRAIN,
ANN BLENKINSOP,
MICHAEL J. WILKINSON,
SUSAN WEEKS,
RICHARD LEITCH, and
THE BRITISH STEAMSHIP INVESTMENT TRUST, LIMITED,
By ROB'T M. HUGHES, *Proctor.*

Service accepted September 20, 1895.

WILHELMUS MYNDERSE,
Proctor for Canton Insurance Company, Limited, and Others.

FLOYD HUGHES,
Proctor for Port of Plymouth Steamship Company.